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# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1889.**

No. 606. 302 29

THE STATE OF MAINE, PLAINTIFF IN ERROR,

*vs.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MAINE.

**FILED NOVEMBER 25, 1887.**

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INDEX.


| | Original. | Print. |
|---|---|---|
| Writ of error | 1 | 1 |
| Return on writ of error | 2 | 1 |
| Citation | 3 | 2 |
| Proof of service of citation | 4 | 2 |
| Bond | 5 | 2 |
| Complaint | 7 | 3 |
| Statement as to removal | 10 | 5 |
| Stipulation waiving jury | 11 | 6 |
| Plea and brief statement | 12 | 6 |
| Bill of exceptions | 16 | 9 |
| Findings of fact | 16 | 9 |
| Conclusions of law | 24 | 13 |
| Judgment | 25 | 14 |
| Clerk's certificate | 25 | 14 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, MAY 20, 1890.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the circuit court of the United States for the district of Maine, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The State of Maine and The Grand Trunk Railway Company of Canada, a railroad corporation operating a railroad in the State of Maine, a manifest error hath happened, to the great damage of the said The State of Maine, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, Maine.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 29th day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

A. H. DAVIS,
*Clerk of the Circuit Court of the United States for Maine District.*

Allowed by—
NATHAN WEBB,
*District Judge.*

2 Circuit Court of the United States, District of Maine.

And now here the judges of the circuit court of the United States in and for said district make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and process in the suit within mentioned and of all proceedings therein.

Seal of the Circuit Court, Maine.

In testimony whereof I, A. H. Davis, clerk of said circuit court, have hereunto set my hand and the seal of said court this first day of November, A. D. 1887.

A. H. DAVIS, *Clerk.*

3 The United States of America to the Grand Trunk Railway Company of Canada, a railroad corporation operating a railroad in the State of Maine, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Maine, wherein The State of Maine is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal of the Circuit Court, Maine.

Witness the Honorable Nathan Webb, judge of the district court of the United States for the district of Maine, this twenty-ninth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

NATHAN WEBB.

4 UNITED STATES OF AMERICA, *District of Maine*, } *ss:*

NOVEMBER 7TH, A. D. 1887.

Pursuant to the within precept I have this day cited and admonished the within-named Grand Trunk Railway Company of Canada by giving in hand to Charles E. Barrett, of Portland, in said district of Maine, who is local treasurer of said Grand Trunk Railway Company, a true and attested copy hereof.

CHARLES B. HARMON,
*U. S. Marshal, District of Maine.*

| | |
|---|---|
| Service | $2 00 |
| Travel | 06 |
| Copy | 50 |
| | $2 56 |

5 (*Bond.*)

Know all men by these presents that Edwin C. Burleigh, as State treasurer, on behalf of the State of Maine, as principal, and Charles F. Flynt and Clarence B. Burleigh, all of Augusta, Kennebec county, Maine, as sureties, — holden and stand firmly bound and obliged unto the Grand Trunk Railway Company of Canada in the sum of two hundred and fifty dollars, to be paid to the said Grand Trunk Railway Company of Canada, its successors or assigns; to the which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the third day of November, in the year of our Lord one thousand eight hundred and eighty-seven.

The condition of the above obligation is such that whereas the

State of Maine hath sued out a writ of error from the circuit court of the United States for Maine district to the Supreme Court of the United States to reverse the judgment rendered in a cause of action between the State of Maine and The Grand Trunk Railway Co. of Canada, lately determined in said circuit court:

Now, therefore, if the said State of Maine shall prosecute its said writ of error to effect and answer all costs in case it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

EDWIN C. BURLEIGH, [L. S.]
*Treasurer of State, in behalf of the State of Maine.*
C. F. FLYNT. [L. S.]
C. B. BURLEIGH. [L. S.]

Signed, sealed, and delivered in presence of—
CLARENCE L. TANNER,
*Witness to E. C. B., C. F. F., & C. B. B.*

Approved.
NATHAN WEBB,
*Dist. Judge.*

A true copy.
Attest: A. H. DAVIS, *Clerk.*

6 [Endorsed:] Bond. From —— —— to —— ——. Dated ——, 18—. McLellan, Mosher & Co., law stationers, 37 Exchange St., Portland, Me.

[Stamped:] Maine district, *ss:* Office clerk C. C. U. S. Rec'd and filed Oct. 7, 1887. Attest: A. H. Davis, clerk.

7 *Transcript of Record.*

At a term of the circuit court of the United States for the first circuit, begun and holden at Portland, within and for the district of Maine, on Monday, the twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-three.

Before Honorable Nathan Webb, district judge.

THE STATE OF MAINE
*vs.*
THE GRAND TRUNK RAILWAY COMPANY OF CANADA, a Railway Corporation Operating a Railroad in the State of Maine.

In a plea of debt, for that said defendant corporation, on the first day of April, A. D. 1881, and for more than a year preceding that day, were and had been operating a railroad within the limits of the State of Maine, which said road lies partly within and partly without this State, and thereby became liable by law to pay to the State treasurer, for the use of said State, an annual excise tax for the privilege of exercising its franchise in said State of Maine, which

tax, with the tax provided for in section one of the act under which this tax was assessed, was in lieu of all taxes upon such railroad, its property and stock, one-half of said tax to be paid to said State on the first day of July and the other half of said tax on the first day of October next following the levy of the same.

And the plaintiff avers that heretofore, to wit, on the first day of April, A. D. 1881, the Governor and council of the State of Maine, in the performance of the duty required of them by law and within the time and in the manner prescribed by statute, did determine
8 the amount of said excise tax to be paid by said defendant for the year 1881 at the sum of nine thousand five hundred sixty-nine dollars and sixty-six cents ($9,569.66), and duly and legally levied and reported the same to the State treasurer of the said State of Maine, and said treasurer forthwith, to wit, on the fourth day of April, 1881, gave notice thereof and of such determination of the Governor and council to said defendant corporation; and by force of said proceedings of said Governor and council and treasurer of said State, and by force of the statute in such case made and provided, the said defendant corporation then and there became indebted and liable to pay said sum of nine thousand five hundred sixty-nine dollars and sixty-six cents to said State of Maine, one-half of said sum on the first day of July, 1881, and the other half of said sum on the first day of October, 1881; yet the said defendant corporation has not paid the same nor any portion thereof, but has neglected and refused to pay the same, and still neglects and refuses to pay the same, and detains the same, though said first days of July and October have long since elapsed, whereby, and by force of the statute in such case made and provided, an action hath accrued to said State of Maine to have and recover of said defendant corporation said sum of nine thousand five hundred and sixty-nine dollars and sixty-six cents, with interest upon one-half thereof, at the rate of ten per cent. per annum, from the first day of July, 1881, and interest at the rate of ten per cent. per annum upon the other half thereof from the first day of October, 1881, amounting in the whole to the sum of ten thousand one hundred sixty-seven dollars and seventy-seven cents ($10,167.77).

Also, for that said defendant corporation, on the thirtieth day of March, in the year of our Lord one thousand eight hundred and
9 eighty-two, and for more than two years previous thereto, was and had been operating a railroad in the State, the same lying "partly within and partly without this State," and thereby became liable by law to pay to the State treasurer, for the use of said State, an annual excise tax for the privilege of exercising its franchises in the State of Maine, one-half of said tax to be paid to said State of Maine on the first day of July and the other half on the first day of October next following the levy of the same.

And the plaintiff avers that heretofore, to wit, on the thirtieth day of March, 1882, the Governor and council of the State of Maine, in the performance of the duty required of them by law, and within the time and in the manner prescribed by the statute, did determine the amount of such excise tax to be paid by the defendant cor-

poration for the year 1882 at the sum of twelve thousand ninety-five dollars and fifty-six cents ($12,095.56), and duly levied the same, and on said thirtieth day of March duly and legally reported the same to the State treasurer of said State, and said treasurer, on the fourth day of April, A. D. 1882, gave notice thereof and of such determination of the Governor and council to said defendant corporation; and by force of said proceedings of said Governor and council and treasurer of said State, and by force of the statute in such case made and provided, the said defendant corporation then and there became indebted and liable to pay said sum of twelve thousand ninety-five dollars and fifty-six cents to said State of Maine, one-half of said sum on the first day of July, 1882, and the other half on the first day of October, 1882; yet the said defendant corporation has not paid the said first half of said sum, which became due and payable on the said first day of July, 1882, nor any portion thereof, but has neglected and refused to pay the same, and
10 still neglects and refuses to pay the same, and detains the same, though said first day of July has long since elapsed, whereby, and by force of the statute in such case made and provided, an action hath accrued to the said State of Maine to have and recover of said defendant corporation one-half of said sum of twelve thousand ninety-five dollars and fifty-six cents, to wit, the sum of six thousand forty-seven dollars and seventy-eight cents, with interest upon said last-named sum, at the rate of ten per cent. per annum, from said first day of July, 1882, amounting in all to the sum of six thousand one hundred and eight dollars and twenty-six cents ($6,108.26).

Yet the said defendant, though requested, has not paid the same, but neglects so to do; all of which is to the damage of the said plaintiff (as it says) the sum of thirty thousand dollars.

This action was brought for and entered in the supreme judicial court of the State of Maine, holden at Portland, within and for the county of Cumberland, on the second Tuesday of October, in the year of our Lord one thousand eight hundred and eighty-two.

And at the same term of the said court the defendant company filed a petition alleging that they then and on the first day of September, A. D. 1882 (being the date of the writ), were a corporation created by the Legislature of the Province of Canada; that a suit had been commenced against said railway company by the State of Maine, one of the United States of America, then and at the time of the commencement of said suit a citizen of said State of Maine, which had been duly entered in said court, and that the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, and praying that said cause might be removed for trial into the next circuit court of the United States to be holden
11 at Portland, within and for the district of Maine, on the twenty-third day of April, in the year of our Lord eighteen hundred and eighty-three; and thereupon, to wit, on the 10th day of said October, the bond in such case made and provided having been filed and approved, said petition was allowed, and it was

ordered that said action be transferred to the circuit of the United States for the district of Maine, as prayed for in said petition.

And at said April term of this court said cause was entered by the defendant company and copies of the case filed therein on the first day of its session, according to the provisions of the statute of the United States in such case made and provided.

Said action was continued from term to term to September term, A. D. eighteen hundred and eighty-four, when is filed the following:

*Stipulation.*

In the above-entitled cause it is hereby stipulated in writing that a jury is hereby waived, and that all issues of fact in said case shall be tried and determined by the court without the intervention of a jury. The finding of the court upon the facts may be either special or general and shall have the same effect as the verdict of a jury.

HENRY B. CLEAVES,
*Attorney General of Maine, Attorney of Record for the State of Maine.*
ALMON A. STROUT,
*Attorney of Record for the Grand Trunk Railway Company of Canada.*

And on the eighth day of December, A. D. eighteen hundred and eighty-four, is filed the following:

12 *Plea and Brief Statement.*

And now comes the said Grand Trunk Railway Company of Canada and defends, &c., when, &c., and says that it does not owe the said State of Maine the said sum of ten thousand one hundred and sixty-seven dollars and seventy-seven cents and the sum of six thousand one hundred and eight dollars and twenty-six cents or any part thereof, in manner and form as the said State of Maine hath in its writ and declaration declared against it; and of this it puts itself upon the country.

THE GRAND TRUNK RAILWAY CO. OF CANADA,
By A. A. STROUT, *Its Attorney.*

And the plaintiff likewise, by—

HENRY B. CLEAVES, *Its Attorney.*

And for a brief statement of the special matters of its defense said Grand Trunk Railway Company of Canada, by leave of the court first had and obtained, comes and further saith—

That it is and was at the time of assessing the taxes mentioned in the plaintiff's writ and declaration a corporation duly incorporated by the laws of the Province of Canada, having its principal place of business at Montreal, in the said Province of Canada; that at

said time it was in the possession of a line of railroad extending from Detroit, in the State of Michigan, through the Dominion of Canada, to Island Pond, in the State of Vermont, and thence through the States of Vermont, New Hampshire, and Maine, to Portland, in the said State of Maine, and over said railroad transported freight and passengers as a common carrier; that the line of road ex-
13 tending from said Island Pond, in said Vermont, to said Portland, in the State of Maine, was owned and built by the Atlantic and Saint Lawrence Railroad Company under its charter, granted by the Legislature of said State of Maine by act approved February 10, 1845, being chapter one hundred and ninety-five of the Special Laws of the State of Maine for the year 1845; that by section 16 of said charter and act it was provided as follows:

"SEC. 16. All real estate purchased by said corporation for the use of the same under the fifth section of this act shall be taxable to said corporation by the several towns, cities, and plantations in which said lands lie in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city, or plantation and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof in the places where they reside and have their home; and whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses the directors shall make a special report of the fact to the Legislature, from and after which time a moiety, or such other portion as the Legislature may from time to time determine, of the net income from said railroad accruing thereafter over and above ten per centum per annum, first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the State for the use of the State, and the State may have and maintain an action against said corporation therefor to recover the same; but no other tax than herein is provided shall ever be levied or as-
14 sessed on said corporation or any of their privileges or franchises."

That under said act said Atlantic and St. Lawrence Railroad Company was duly organized and duly accepted the said charter, and by virtue thereof constructed said railroad and the property connected therewith from Portland to the boundary of said State of Maine, and then, having obtained proper legislative authority from the States of New Hampshire and Vermont constituting the said Atlantic and St. Lawrence railroad a corporation within said States, with a right of way and all the privileges and immunities secured to said corporation by its charter, constructed said line of railroad through said States to Island Pond, in said State of Vermont, in accordance with its charter and said acts.

That afterward, by act approved March 29, 1853, being chapter 150 of the Special Laws of 1853, said Legislature of the State of Maine authorized said Atlantic and St. Lawrence Railroad Company to execute such lease of the railroad of such company, or contract

in the nature of a lease, as should enable the lessees thereof to maintain and operate, by means of said railroad and other roads and extensions of the same, connecting lines of railroads from the Atlantic Ocean, in Portland, to Montreal, in the Province of Canada, with all the rights, privileges, and immunities of said lease; and that in pursuance of said authorization, on the fifth day of August, 1853, the Atlantic and St. Lawrence Railroad Company executed a lease to John Ross, Benjamin Holmes, and William Jackson, trustees of the Grand Trunk Railway Company of Canada, of the said railroad from Portland to Island Pond, in the State of Vermont, with all its property and estate, real, personal, and mixed, wheresoever the same may be situated, and all rights of way and other easements, rights to acquire easements, road-bed, superstruction, equipments, apparatus, implements, rails, and other material and stores, rights and privileges of the said Atlantic and St. Lawrence Railroad Company, for the term of ninety-nine years from the first day of July, one thousand eight hundred and fifty-three; and thereafterwards, on the ninth day of February, one thousand eight hundred and fifty-five, said John Ross, Benjamin Holmes, and William Jackson, trustees as aforesaid, duly assigned said lease, with all their rights and privileges connected therewith, to the Grand Trunk Railway Company of Canada; that thereafterwards said Grand Trunk Railway Company of Canada entered into possession of the said railroad as a part of its trunk line from the city of Detroit, in the State of Michigan, to the city of Portland, in the State of Maine, and then and there was entitled to all the immunities, privileges, rights, easements, and property of the Atlantic and St. Lawrence railroad, and then and there took upon itself certain burdens and paid certain rentals, and became carriers of freight and merchandise over said road in place of the said Atlantic and St. Lawrence Railroad Company.

And the defendant further saith that by reason of said contract and charter, it being in the said State of Maine as a lessee and successor of the said Atlantic and St. Lawrence Railroad Company, the said defendant is exempt from payment of any tax other than that provided by section 16 as aforesaid, and is not liable to pay the tax now claimed against it in said writ.

And the said defendant further saith that said statute of the State of Maine mentioned in the plaintiff's writ and declaration is contrary to the provisions of the Constitution of the United States and of the constitution of the State of Maine, and is in violation of said charter of the Atlantic and St. Lawrence Railroad Company, and impairs the obligation of the contract contained in said charter and of the contract with this defendant, holding the rights and privileges of said charter by authority of said State of Maine.

THE GRAND TRUNK RAILWAY
OF CANADA,
By A. A. STROUT, *Its Attorney.*

And said cause came on to be heard and was fully argued by counsel before Webb, J., and said cause was further continued from term to term to this term, when the facts of the case were determined and filed by the court, and the rulings of law on these facts were announced to the respective parties and their counsel, who were called upon to state their exceptions before judgment should be entered.

And the same plaintiff thereafter, before final decision of the cause and entry of judgment, presented its bill of exceptions and prayed that the same might be allowed and signed by the court and made a part of the record in the case; which bill of exceptions was so allowed and signed and made a part of the record, as follows:

*Bill of Exceptions.*

This was an action of debt for taxes assessed by the State of Maine for the years 1881 and 1882. The action was commenced in the State court, and by the defendant removed to this court, where it was tried without a jury.

The court found the facts as follows: By an act of the Legislature of this State approved Feb'y 10, 1845, the Atlantic and St. Lawrence Railroad Company was incorporated, with power to construct
17 and maintain a railroad from some point in the city of Portland to the boundary line of the State of Maine "at such place as will best connect with a railroad to be constructed from said boundary to Montreal, in Canada."

Section 14 of the act of incorporation further provided "said corporation is vested with power and authority to continue and prolong said railroad beyond the line of this State to the boundary of Canada, and to purchase, take, and hold lands or the right of way over lands for the purpose of constructing said railroad in continuation, without the limits of this State, on and over said lands to the said boundary of Canada:

"Provided the same can be done consistently with the laws and regulations of the State or States in which said lands lie and through and over the territory of which such railroad in continuation would pass."

The necessary authority for such continuation of the railroad was obtained from the States of New Hampshire and Vermont, and the road was constructed from Portland to Island Pond, in Vermont. In the State of Maine are 82½ miles of this railroad; in New Hampshire 52 miles, and in Vermont 15 miles.

By section 16 it was enacted:

"All real estate purchased by said corporation for the use of the same, under the fifth section of this act, shall be taxable to said corporation by the several towns, cities, and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city, or plantation, and not otherwise, and the shares owned by the respective stockholders shall

be deemed personal estate and be taxable as such to the
18 owners thereof in the places where they reside and have their home; and whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses the directors shall make a special report of the fact to the Legislature, from and after which time one moiety, or such other portion as the Legislature may from time to time determine, of the net income from said railroad accruing thereafter over and above ten per centum per annum, first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the State for the use of the State, and the State may have and maintain an action against said corporation therefor to recover the same; but no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises."

Section 18 gives to the Legislature the right to inquire into the doings of the corporation and its use and employment of the privileges and franchises granted to it, with power "to correct and prevent abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities, and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities, or obligations; and this charter shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law."

The Grand Trunk Railway Company of Canada is a foreign corporation, incorporated under the laws of the Province of Canada, and has its principal place of business at Montreal, in the
19 Dominion of Canada, and possessed in the year 1853, and from that time to the present has continually possessed, a railroad connecting with and in extension of the railroad of the Atlantic and St. Lawrence Railroad Company at Island Pond, in the State of Vermont, and extending to Montreal. It also, at and long before the date of the assessment of taxes demanded in this action, possessed a line of railroad connecting with the before-mentioned railroad at Montreal and extending through the Dominion of Canada to Detroit, in the State of Michigan.

On the 29th day of March, 1853, by an act of the Legislature of the State of Maine approved that day, the Atlantic and St. Lawrence Railroad Company was authorized to "enter into and execute such a lease of the railroad of said company, or contract in the nature of a lease, as will enable the lessee thereof to maintain and operate, by means of said railroad and other roads in extension of the same, a connected line of railroads from the Atlantic Ocean at Portland to the city of Montreal, in the Province of Canada, and thence to the western part of said province."

Under the authority thus conferred the Atlantic and St. Lawrence Railroad Company and the Grand Trunk Railway Company entered into a preliminary agreement for a lease to the latter company; but inasmuch as the proposed lessee had not "the legal competency

to enter into and execute such lease for want of the requisite legislative authority therefor," a lease was on the 5th day of August, A. D. 1853, entered into and executed by the Atlantic and St. Lawrence Railroad Company as lessors and certain individuals as lessees and trustees for the Grand Trunk Railway Co., the
20 lessees to hold until the railway Co. should obtain requisite authority, and then to transfer to it the said lease and all right, title, and interest under the same.

The trustees and lessees, on the ninth day of February, A. D. 1855, formally assigned the above-mentioned lease to the defendants, who had in the meantime procured the requisite legislative authority, and thereupon the property was delivered to and taken possession of by the defendants, who have ever since possessed, managed, controlled, and operated the railroad leased, with all its appurtenances, as a part of their line, from Portland through the States of Maine, New Hampshire, and Vermont and the Dominion of Canada to Detroit, in the State of Michigan.

Feb. 10, 1872, the Lewiston and Auburn Railroad Company was incorporated by the Legislature of Maine, with authority to locate and construct a railroad "from some point in the city of Lewiston to some point on the Atlantic and St. Lawrence railroad, otherwise known as the Grand Trunk railway, within the limits of the city of Auburn."

Under this authority a line some five and one-half miles in length was constructed, and on the 25th of March, A. D. 1874, was leased to the defendants, who have since been constantly in the control, management, and possession of the same.

One clause in this lease is: "All taxes which may lawfully be assessed upon the corporate property or franchise of the lessors during the period of their lease may be paid by the lessee, and if so paid shall be deducted from the rent herein covenanted to be paid by said lessee."

The charter of the Lewiston & Auburn R. R. Co. contains nothing in respect to taxation nor any exemption from or restriction of legislative control.

21 The Norway Branch Railroad Company was incorporated by the Legislature of this State Feb. 22, 1872, to construct and maintain a railroad "from some point in or near the village of Norway, thence to South Paris, connecting at that point with the Grand Trunk railroad."

This road is about one and one-half miles in length, and after its construction by permission of the Legislature was leased, prior to the time covered by these assessments, to the defendant company, in whose possession, management, and control it has since been.

Nothing is found in its charter about taxes, nor is the general control of the Legislature in anywise restricted or limited.

The Atlantic & St. Lawrence Railroad Company was duly constituted a corporation in New Hampshire and Vermont by the Legislatures of those States, and its lease to the Grand Trunk Company was by the same authority confirmed and approved.

The defendant company did not make returns to the railroad

commissioners of its operations to Sept. 30 of each of the years preceding the assessments, as required by the statutes of Maine, but it did cause reports and returns to June 30, of each of those years, to be made by the Atlantic and St. Lawrence Railroad Company, the data from which such returns were made being given by the Grand Trunk Railway Co., whose accounts were annually balanced to June 30.

These returns showed the gross transportation receipts of the Atlantic and St. Lawrence Railroad Company to be for the year ending June 30, 1880, $956,202.45, and for the year ending June 30, 1881, $1,018,667.33.

22 On the 1st day of April, A. D. 1881, the Governor and council, at a regular executive session and within the time prescribed by the statute, proceeded to ascertain the amount of excise taxes for the year 1881 which corporations operating railroads in this State should under the provisions of the statute pay to the State treasurer, for the use of the State, for the privilege of exercising their respective franchises in the State, and determined the amount of such tax to be paid by the defendant railroad company, operating the Atlantic & St. Lawrence railroad, the Lewiston & Auburn railroad, and the Norway Branch railroad, to be the sum of $9,569.66, to which assessment the signatures of the Governor and councilors were on the same day affixed.

This assessment was in the time prescribed by the statute reported to the State treasurer, who on the 4th of April gave notice of the same in writing to the defendant company, and that one-half of the tax so assessed upon its franchise would be due and payable on the first day of July then next, and the other half on the first day of the following October.

On the 30th day of March, 1882, the tax for the year 1882 was in like manner ascertained, determined, and reported to the treasurer by the Governor and council and notice thereof, with the time when the same would be due and payable, was given to the defendant on April 4th. The tax was determined at the sum of $12,095.56.

Tho several taxes thus assessed are somewhat in excess of the amounts that would be assessable upon the gross transportation receipts for the respective years ending June 30, returned by the Atlantic & St. Lawrence Railroad Company; but those returns did not make any mention of the Lewiston & Auburn railroad

23 or of the Norway Branch railroad, both in the State of Maine and both operated by the defendant company in connection with the Atlantic & St. Lawrence. The returns, on their face at least, were strictly confined to the Atlantic & St. Lawrence railroad, which was stated to operate a total line of 149½ miles, of which 82½ miles were in this State, and did not conform to the statute requirement in respect to the time covered by those returns. If the other two railroads mentioned had been included, the total length and also the miles in Maine would have been seven miles more.

How much, if any, increase of gross transportation receipts was to be made on account of these short roads does not appear.

The statute imposing these taxes provides, sec. 7: "If the returns

now required by law in relation to railroads shall be found insufficient to furnish the basis upon which the tax is to be levied, it shall be the duty of the railroad commissioners to require such additional facts in the returns as may be found necessary; and until such returns shall be required or in default of such returns when required the Governor and council shall act upon the best information they may be able to obtain."

There is not in this case any evidence that the railroad commissioners required the defendant company or that that company made any other returns than those of the Atlantic & St. Lawrence Company already mentioned.

Section 6 of the tax statute also provides that "any corporation, person, or association aggrieved by the action of the Governor and council in determining the tax, through error or mistake in calculating the same, may apply for an abatement of any

24 such excessive tax within the year for which such tax is assessed, and if, upon rehearing and examination, the tax appears to be excessive through such error or mistake," such excess shall be abated.

The defendant company made no application for any abatement of the tax assessed upon it in either year, but constantly denied its liability to taxation and refused to pay.

This action is for the whole tax of 1881, with interest upon one-half of the same from July 1, 1881, and upon the other half from October 1, 1881, at ten per cent. per annum, and for half of the tax for the year 1882, with interest at the same — from July 1st, 1882.

Upon the facts as thus found the court ruled:

That the imposition of the taxes in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United States, and is invalid. And now, before the entry of judgment upon the foregoing findings and rulings aforesaid, the plaintiff says that by this ruling of the court, viz., "That the imposition of the taxes in question in this cause was a regulation of interstate and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United States, and is invalid," it is aggrieved, and excepts thereto, and hereby prays that its exceptions may be allowed.

And inasmuch as the matters hereinbefore referred to and said rulings and decisions would not otherwise appear by the record of said cause, the counsel on the part of the said plaintiff prays the court to sign this bill of exceptions, containing the several

25 matters given and offered in evidence and the rulings and decision of the court thereon, and the exceptions thereto, that the same may become a part of the record of said cause.

By ORVILLE D. BAKER,
*Attorney General for the State of Me.*

All of which, being found to be true, is allowed.

In witness whereof I have hereunto set my hand this 20th day of September, A. D. 1887.

NATHAN WEBB,
*District Judge.*

And the said plaintiff's bill of exceptions, so allowed and signed by the presiding judge, is then and there placed on file, and the court enters a decision that the defendant does not owe the plaintiff as the plaintiff hath in its writ and declaration declared against it.

All of which being seen and understood, it is therefore considered by the court here, to wit, on the twenty-first day of September, A. D. eighteen hundred and eighty-seven, that the said plaintiff, The State of Maine, take nothing by its said writ, and that the said defendant, The Grand Trunk Railway Company of Canada, recover of the said plaintiff its costs of said —, taxed at —.

Circuit Court of the United States, District of Maine.

I, A. H. Davis, clerk of the circuit court of the United States for the district of Maine, do hereby certify that the foregoing is a true transcript of the record and proceedings in the cause therein mentioned.

Seal of the Circuit Court, Maine.

Witness my hand and the seal of said circuit court this first day of November, A. D. 1887.

A. H. DAVIS, *Clerk.*

Endorsed on cover: Maine C. C. U. S. No. 606. The State of Maine, plaintiff in error, *vs.* The Grand Trunk Railway Company of Canada. Filed November 25, 1887.

Office Supreme Court U. S.
FILED.
APR 13 1891
JAMES. H. McKENNEY.
CLERK.

# SUPREME COURT OF THE UNITED STATES.

NO. 302.

**STATE OF MAINE, PLAINTIFF IN ERROR,**

***vs.***

**THE GRAND TRUNK RAILWAY COMPANY, OF CANADA.**

BRIEF FOR THE STATE OF MAINE.

BY CHARLES E. LITTLEFIELD, *Attorney General.*

# SUPREME COURT OF THE UNITED STATES.

## No. 606.

STATE OF MAINE, PLFF. IN ERROR,

*vs.*

THE GRAND TRUNK RAILROAD CO., OF CANADA.

## BRIEF FOR THE STATE OF MAINE,

By CHARLES E. LITTLEFIELD, *Attorney General.*

*May it please your Honors:*

This is an action of debt for a tax assessed by the State of Maine upon the defendant corporation for the years 1881 and 1882 by virtue of the provisions of a statute of the State of Maine, Public Laws of Maine, 1881, Chap. 91, which statute is now embodied in the Revised Statutes of Maine, 1883, Chap. 6, Sec. 42 *et seq.*, and which, so far as material, reads as follows: "When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the gross receipts in the State as herein provided, and its amount shall be determined as follows: the gross transportation receipts of such railroad line or system, as the case may be, over its whole extent within and without the State, shall be

divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the State." Attention is now called to the fact that this statute authorizes a tax only upon the gross receipts in the State, as it provides that "the tax shall be equal to the same proportion of the gross receipts in the State," and then provides the manner in which this "proportion shall be determined."

The record discloses the following facts involved in the discussion of the proposition which the plaintiff will seek to maintain. The defendant is a railway corporation incorporated under the laws of the Province of Canada, having its principal place of business at Montreal, in the Dominion of Canada. It does not appear that it does not have a place of business at the terminus of the railroad which it is operating, in Portland, in the State of Maine. It does appear that it has its "principal place of business at Montreal." The railroad now operated and possessed by the defendant corporation was originally constructed by the Atlantic & St. Lawrence Railroad Company under a charter from the State of Maine, granted February 10th, 1845. This authorized the construction and operation of a railroad from "the city of Portland to the boundary line of the State of Maine." Having obtained the necessary authority from the States of New Hampshire and Vermont, that company constructed its railroad from Portland, in Maine, to Island Pond, in Vermont, a distance of 149½ miles, 82½ of which are within

the State of Maine. The Atlantic & St. Lawrence Railroad Company was a domestic corporation, deriving its corporate existence from, and holding its franchises under, the State of Maine. By virtue of authority derived from the Legislature of Maine March 29th, 1853, the Atlantic & St. Lawrence Railroad Company transferred by lease its rights and privileges under its charter, through the medium of certain trustees, to the Grand Trunk Railway Company, the defendant, after that company had obtained the requisite legislative authority to receive the lease. Since that time, by virtue of this authority derived from the State of Maine, the Grand Trunk Railway Company has been maintaining and operating the railroad and exercising and using these franchises of the Atlantic & St. Lawrence Railroad Company.

As to tax assessed upon the corporate property or franchise thus possessed, used and operated by the Grand Trunk Railway Company by its contract with this lessor, the Grand Trunk Railway Company stands precisely in the same position as to the State of Maine except as to certain exemptions from taxation that the Atlantic & St. Lawrence Railroad Company occupied. The lease under which it exercises these franchises contains this express agreement with the lessor: "All taxes which may lawfully be assessed upon the corporate property or franchise of the lessors during the period of their lease may be paid by the lessee, and, if so paid, shall be deducted from the rent herein covenanted to be paid by said lessee."

The attention of the court is requested to the significance of the language of this clause in the lease, inasmuch as it especially provides for the payment of a tax upon the " franchise " of the lessor by the lessee, and provides the manner of reimbursement to the defendant corporation whenever such tax upon the franchise is paid by them. This element of tax upon the franchise will be seen to be one of great importance when the cases relied upon by the plaintiff are hereafter referred to.

While the Grand Trunk Railway Company made no returns as a corporation, it furnished the data and caused the Atlantic & St. Lawrence Railroad Company to make a return of the gross transportation receipts over its road of 149½ miles in length, including the 82½ miles in Maine, for the years 1881 and 1882, and upon this return, under the provisions of the statute above referred to, the Governor and Council ascertained the " proportion of the gross receipts in the State," and assessed the tax in controversy accordingly. The tax thus assessed for 1881 was $9,569.66, and for 1882, $12,095.56. Upon these facts, the other facts disclosed in the record not being material in the discussion of the question involved, the judge below held " that the imposition of the tax in question in this case was a regulation of inter-State and foreign commerce, in conflict with the exclusive powers of Congress under the Constitution of the United States, and is invalid." Of this ruling the plaintiff complains. This is the only ruling complained of, and its correctness is the only question, as we apprehend, that the court will consider upon this record.

The question may be succinctly stated thus: Is a tax upon the gross transportation receipts in the State of Maine of a railroad lying partly within and partly without the State, ascertained by multiplying its average gross receipts per mile for the whole length by the number of miles within this State, in conflict with Art. 1, Sec. 8, Part 3, of the Constitution of the United States? Is such a tax a regulation of or an interferance with inter-State and foreign commerce? We contend that it is not.

## II.

At the threshold of the discussion to which we respectfully ask the attention of the court, we desire to say that we are not unmindful of the trend of judicial opinion of this court with reference to this clause of the Constitution which is described with such felicity by Mr. Justice Bradley in *Leloup vs. Port of Mobile, 127 U. S. 648*, when speaking for the court he says: "A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years, which has frequently made it necessary to re-examine the whole subject with care, and the result has sometimes been that in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles of the statute illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally

been made in the intervening period. This is always done, however, with great caution and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts."

We do not deem it profitable to examine all of the cases where this question has been before the court in its various phases. We refer only to those upon which we rely as being closely in point, sustaining our contention, and to their present status in this court as authority. The cases of *State Tax on Railway Gross Receipts, 15 Wall, 284,* and the *Delaware Railroad Tax, 18 Wall, 206,* are, we think, decisive in support of our proposition, if they are still binding authority upon this court. A chronological examination of these cases will give a clear idea of the law as it is held to-day.

The case of the *State Tax on Railway Gross Receipts* was one where the State of Pennsylvania assessed a tax upon the Reading Railroad Company, a corporation created by the State of Pennsylvania, under a statute that required railroad companies incorporated under the laws of Pennsylvania to "pay to the Commonwealth a tax of three-fourths of one percentum upon the gross receipts of said company," and as a basis for said tax the company was required to transmit to the auditor general "a statement, under oath or affirmation, of the amount of the gross receipts of the said company during the preceding six months." Here is to be noticed a very important distinction between the Pennsylvania statute and the Maine statute involved at bar. The Pennsylvania

statute does not confine the "gross receipts" to those received within the State; the Maine statute does. The Pennsylvania statute in terms — no exception appearing in the act and in its practical application — applied to all receipts from transportation as well without the State as within it. It covered receipts from freight exported without the State. It did not take that proportion of the gross receipts that was earned up to the State line, but followed the gross receipts the whole distance that the freight was transported. The whole controversy in that case was over just such gross receipts as the following extract from the statement of the case shows: "The account, as stated by the accounting officer of the commonwealth, was based on returns made by the company which discriminated between receipts from freight transported to points within and receipts from freight exported to points without the State of Pennsylvania. The latter were returned under protest against their liability to taxation, and the tax assessed against these receipts made the subject of the present controversy." The receipts, then, that were the subject of controversy in that case, were the gross receipts over the whole length of the line operated by the railroad, or over which freight was transported by them within and without the State, and was not limited, as at bar, to the proportion of the gross receipts received within the State. At bar the State of Maine, in the only practicable way, expressly limits the application of this tax to "gross receipts in the State." The Pennsylvania statute could and did operate *extra territorially*. The Maine statute does not and cannot, and certainly the Maine statute is less open to the imputation that it is a regulation of inter-State commerce than the Pennsylvania statute. In that case the court held that the Pennsylvania statute was valid, and

assigned several grounds, first because it was a "tax upon the fruits of such transportation after they have become intermingled with the general property of the carrier." (P. 295.) With reference to this point, among other things the court say: "No doubt every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce, yet it is not every thing that affects commerce that amounts to a regulation of it within the meaning of the statute." * * * * * *

"Is, then, the tax imposed by the act of February 23d, 1866, a tax upon freight transported in or out of the State, or upon the owner of freight having the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car or a canal or steamboat, its tendency is to increase the cost of transportation, still it is not a tax upon transportation or upon commerce, and it has never been seriously doubted that such a tax may be laid." * *

"But when, as in the other case between these parties, a company is made an instrument by the lease to collect the tax from transporters, when the statute plainly contemplates that the contribution is to come from them, it may properly be said they are the persons charged. Such is not this case. The tax is laid upon the gross receipts of the company, laid upon a fund

which has become the property of the company, mingled with its other property, and possibly expended in improvements or put out at interest. The statute does not look beyond the corporation to those who may have contributed to its treasury. The tax is not levied, and indeed such a tax cannot be, until the expiration of each half year, aud not until the money received from freights and from other sources of income has actually come into the company's hands; then it has lost its distinctive character as freight earned by having become incorporated into the general mass of the company's property. While it must be conceded that a tax upon inter-State transportation is invalid, there seems to be no stronger reason for denying the power of a State to tax the funds of such transportation after they have become intermingled with the general property of the carrier than there is in denying the power to tax goods which have been imported after their original packages have been broken and after they have been mixed with a mass of personal property in the country. That such a tax is not unwarranted is plain." * * *

"But we think it may be safely laid down that the gross receipts of railroad or canal companies after they have reached the treasury of the carrier, though they may have been derived in part from transportation of freight between States, have become subject to legitimate taxation."

They sustain the tax in controversy upon the further and second ground that it was a tax upon the value of the franchise. The court say: "There is another view of this case to which brief reference may be made. It is not to be questioned that the

States may tax the franchises of companies created by them (or we submit, as at bar, exercising them by its authority and permission) and that the tax may be proportioned either to the value of the franchise granted or to the extent of its exercise; *nor is it deniable that gross receipts may be a measure of proximate value*, or if not, at least to the extent of enjoyment. If a tax be in fact laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise."

We presume that the cases of *Fargo vs. Michigan, 121, U. S. 230*, and *Philadelphia Steamship Co. vs. Penn., 122 U. S., 326*, will be relied upon as overruling the case of *State Tax upon Railway Gross Receipts*, but before discussing those cases it is important to notice the respect paid by this court to that case as authority up to the time of the decisions in those two cases.

In the case of *Osborne vs. Mobile, 16 Wall, 479*, in a strong opinion drawn by Chief Justice Chase, the court refer to the case of *State Tax on Railway Gross Receipts* in the following language: "In another we held that a tax upon gross receipts for transportation by railroad and canal companies chartered by the State is not obnoxious to the objection of repugnance to the constitutional provision." * * * *

"The tax on gross receipts was held to be not repugnant to the Constitution, because imposed on the railroad companies in

the nature of a general income tax, and incapable of being transferred as a burden upon the property carried from one State to another."

In the case of *Erie Railway Co. vs. Pennsylvania, 21 Wall, 492*, the court assumed that the case of *State Tax upon Railway Gross Receipts* settled the validity of such a tax, the statement of the case containing this remark: "It was decided by this court, as the reader will remember, in the case of the *State Tax on Railway Gross Receipts*, that the tax upon the gross receipts of a railway company is snch a tax as it is within the power of the State to impose."

The court were there passing upon a case involving clear inter-State commerce, as only a small portion, 42½ out of 455 miles of the railroad in controversy, was within the State of Pennsylvania, and the tax was upon the gross receipts.

Upon the first proposition maintained in the case of *State Tax on Railway Gross Receipts*, that such receipts had lost their character as being an incident of importation or commerce and become subject to the taxing power of the State, that case is cited with approval in *Murray vs. Charleston, 96 U. S., 446*, decided in 1877.

To support the general proposition that "every tax upon property, it is true, may affect more or less the operations of commerce by diminishing the profits to be derived from the subjects of commerce, but it does not for that reason amount to

a regulation of commerce within the meaning of the Federal Constitution," the case of *State Tax on Railway Gross Receipts* is cited by the court in *Brown vs. Houston, 114 U. S. 627*, as late as 1884, without any intimation that it was a doubtful authority.

In *Hall vs. DeCuir, 95, U. S. 487*, it is cited to support substantially the same proposition, and no suggestion is made to indicate that it is other than a well considered case.

In *Moren vs. New Orleans, 112 U. S., 74*, decided in 1884, in discussing a municipal ordinance of the city of New Orleans which established the right of licensing professions, callings and other business, and assessed and directed to be collected from persons owning and running towboats to and from the Gulf of Mexico to the city of New Orleans, holding the same void as a regulation of commerce among the States, the court recognized the authority of the case of *State Tax on Railway Gross Receipts*, and assumed that it was still binding upon the court when it said: "It is said, however, to be a tax on an occupation, and for that reason not a regulation of commerce. If it were a tax upon the income derived from the business, it might be justified upon the point of the discussion in the case of *State Tax on Railway Gross Receipts, 15 Wall 284*, which shows the distinction between the tax upon transportation and the tax upon its fruits realized and reduced to possession so as to become part of the general capital and property of the taxpayer."

In a dissenting opinion in the case of *Pacific Railway Co. vs. Illinois 118, U. S. 557*, Mr. Justice Bradley, with whom the Chief Justice and Mr. Justice Gray concurred, treats the case of *State Tax on Railway Gross Receipts*, as still authority and binding upon the court, and says upon that point: "We have omitted to cite a number of cases corroborating the views we have expressed. The case of *State Tax on Railway Gross Receipts, 15 Wall, 284*, is weighted with arguments and considerations in this direction, and we will also refer to the case *Osborne vs. Mobile, 16 Wall, 479, Railroad Company vs. Fuller, 17 Wall, 560, &c.*," thus clearly assuming that the first case referred to was still binding as authority in the United States Supreme Court, and no intimation is made in the dissenting opinion that the doctrine asserted in that case had been in any way at that time questioned, disputed or denied.

The case of *Fargo vs. Michigan, supra*, comes very far short of overruling the case of *State Tax on Railway Gross Receipts*. On the contrary, it indirectly affirms that case. The opinion in *Fargo vs. Michigan* was drawn by Mr. Justice Miller who dissented from the opinion in case *State Tax on Railway Gross Receipts*. On p. 242 he states the case *State Tax on Railway Gross Receipts*, and quotes this remark from the opinion in that case with manifest approval, as epitomizing the proposition upon which the case turned, upon one of its grounds: "Very manifestly," said the court, "it is a tax upon the railroad company, measured in amount by the extent of its business or the degree to which its franchise is exercised." And then, after

a further quotation, referring to the other ground upon which that case was decided, he goes on to do what? To deny the authority of that case? To demonstrate the fallacy of the reasoning upon which it is founded? To show that the trend of the opinion of the court has been away from the doctrines announced in that case? Not at all. He virtually recognizes the authority of that case and proceeds to distinguish it from that in which the opinion was being rendered. This was certainly an unnecessary labor if the case was radically unsound. This is what he said: "The distinction between that case (referring to the case of *State Tax on Railway Gross Receipts*) which is mainly relied upon by the Supreme Court of Michigan in support of its decree, and the one which we now have before us, is very obvious, and is two-fold. First, the corporation which was the subject of that taxation was a Pennsylvania corporation, having the situs of its business within the State which created it and endowed it with its franchises. Upon these franchises thus conferred by the State it was asserted the State had a right to levy a tax. Second, this tax was levied upon money in the treasury of the corporation, upon money within the limits of the State which had passed beyond the stage of compensation for freight and had become like any other property or money liable to taxation by the State. The case before us has neither of these qualities. The corporation upon which this tax is levied is not a corporation of the State of Michigan, and has never been organized or acknowledged as a corporation of that State. The money which it received from freight carried within the State probably never was within the State, being paid to the company either at the beginning or the end of its route, and certainly at the time the tax was levied it

was neither money nor property of the corporation within the State of Michigan." And upon this point of the right of the States to impose a tax upon the value of the franchise the case goes on to say: "The proposition that the States can by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have chartered, regulate such business or the affairs of such corporations, has *often been set up as a defence to the allegation that the taxation was such an interferance with commerce as violated the Constitutional provision now under consideration.*

The first distinction made by Mr. Justice Miller in *Fargo vs. Michigan* does not obtain at bar. In that case the Merchants' Despatch Transportation Co., the corporation in controversy, was exercising no franchise rights under the State of Michigan. It was not operating any railroad and could not in any proper sense be said to have any location in that State. It merely owned cars which were transported by any railroad without distinction of route or locality. Here the Grand Trunk Railway is in the actual possession of a franchise conferred by the State of Maine. It is maintaining and operating a railroad in the State of Maine by the authority of the State of Maine, under a franchise granted by the State of Maine. That the Grand Trunk Railroad Co., without that authority, could not exercise these franchise rights, could not for the time being own and possess them, is too well settled to require the citation of authorities. Were this not the fact under the authorities, an express statute of the State of Maine in force at that time prohibits such a lease, without such authority. It

reads as follows: "It is hereby declared that no railroad company has or shall have the right to assign its charter or any of its privileges, immunities, or franchises, without the express authority of the Legislature therefor. Nor shall any railroad company without such express authority lease its road or any portion thereof, or grant the use and enjoyment thereof or any portion of the same, to any other person or corporation, or in any way grant the use, possession or control of the same, to any other party or corporation, or in any way place the control and management of the said road in the hands of any other officers or parties than those contemplated by the charter; and any such lease, contract, agreement, assignment or transfer, heretofore or hereafter made is hereby declared to be null and of no effect." *Public Laws of Maine, 1852, Chap. 247, Sec. 1.*

By the original charter, the State of Maine entrusted to the corporation of the Atlantic & St. Lawrence Railroad Company these valuable franchise rights. In authorizing the lease by the Atlantic & St. Lawrence Railroad Company, the State of Maine entrusted the same franchise rights to the lessees. Can any reason be suggested why the same obligations and duties to, and rights and powers of, the State against the parties to whom this franchise is entrusted, do not inhere as well when the same franchise is in the hands of the lessee as when in the hands of the original corporators, more especially when in the contract of lease between the Atlantic & St. Lawrence Railroad Company and the Grand Trunk Railway Company there is an express

agreement that franchise tax may be paid by the lessee and deducted from the rent to be paid to the Atlantic & St. Lawrence Railroad Company.

It is clear that it is the exercise of franchise rights and privileges that gives them their value. A franchise without the right or opportunity to exercise its privileges would be valueless. Is it not true that when these franchise privileges are exercised by the holders that then this valuable right of the State to insist upon a proper compensation for its value obtains? Who should make such compensation if not the corporation whose use of the franchise has given the State the right to insist upon the compensation? At bar this is clearly the defendant corporation. There was no such condition of things in *Fargo vs. Michigan* The Merchants' Transportation Company did not appear to be in possession of any property permanently, or even transiently, located in the State of Michigan. They were exercising no franchise rights derived from the State of Michigan in any manner. Such franchises as they possessed, if any, gave them no authority to exercise any such franchise rights in the State of Michigan. The exercise of franchise rights in the State of Michigan by them was in no sense essential to the success of the prosecution of their business, and was not an element involved in it. Here the Grand Trunk Railway Company is in the actual possession of 82½ miles of railroad with depots and offices within the State of Maine, constructed by virtue of a franchise granted by the State of Maine, and maintaining and operating it under the same franchise so granted.

It is submitted, therefore, that as to this proposition contained in the case of *State Tax on Railway Gross Receipts quoad* the case at bar, the case of *Fargo vs. Michigan* does not in any way affect the authority of that case.

The second ground of distinction asserted by the court in that case does not obtain here at bar. The terminus of the Grand Trunk Railway is in Portland, Maine, and while nothing appears in the record to indicate the fact either way, inasmuch as the length of the line in Maine is but a small portion of the whole length of the line to Montreal, it is a fair presumption that very much more than the amount of the gross receipts upon which the tax was actually levied was actually received in the Portland office in Maine. Whether it remained there until this tax was actually assessed, while it may not be material, nothing appears in the record to show. The defendant was certainly a tenant in possession in Maine, and as one end of the route was in Maine, as such must have been in possession of more than the gross receipts upon which this tax was assessed. The court say in *Fargo vs. Michigan* on this second point: "The money which it received for freight carried within the State probably never was within the State," certainly does not apply here, as the probability is all the other way, and so far as probabilities go there is nothing to show why as much of the gross receipts were not paid in at the Portland end of the route as at the Montreal end of the route.

The reason that is given in that case as demonstrating the fact that the receipts were never within the State, is that they

were " paid to the company either at the beginning or the end of its route," which reason is clearly inapplicable to the case at bar. It is submitted, therefore, that notwithstanding the case of *Fargo vs. Michigan*, the case *State Tax on Railway Gross Receipts* still stands an authority controlling at bar.

The next case in which the case upon which we rely was under discustion contains in its head note the following remark: " *State Tax on Railway Gross Receipts, 15 Wall, 284*, considered and questioned." If this syllabus was prepared by the court, as to which I am uninformed, it would seem to indicate that the court did not even then consider the case overruled and fully denied. It must be admitted, however, that an examination of the opinion discloses the fact that, as to one of the grounds, that the tax could be sustained as one laid upon the fruits of transportation, that case is practically overruled by that of *Philadelphia & Southern Steamship Co. vs. Penn. 122. U. S., 326.*

After discussing this ground to which the court in that opinion refer as the first ground, the court say in conclusion: " A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable, that it is not supported by anything decided in *Brown vs. Maryland*, but on the contrary, that the reasoning in that case is decidedly against it." With reference to the second proposition upon which the case of *State Tax on Railway Gross Receipts* was placed, the court say: " The second

ground on which the decision referred to was based was that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because by the terms of the act it was laid equally upon the corporations of other States doing business in Pennsylvania." Inasmuch as the court took pains to distinguish the case then under consideration from the second ground relied upon in *State Tax on Railway Gross Receipts*, it is a fair presumption at least that the court were not then prepared to declare that ground unsound. We are not aware that the case of *State Tax on Railway Gross Receipts* is questioned or denied in any other decision in this court.

The case *Delaware Railroad Tax, 18 Wall, 206*, is, we think, strongly in point in our favor. That was a case where the tax, though not assessed upon the gross railway receipts, was assessed upon net earnings or income received from all sources during the preceding year, and with the exception of this distinction between the particular sum upon which the tax was assessed, which we submit is in no sense material to the question under discussion, the act of the legislature by virtue of which the tax was assessed was strikingly parallel to that at bar. The first section of the act provided that all railroad and canal companies incorporated under the laws of the State and doing business therein, should, on the first day of January then commencing, and on the first day of January in each year afterwards, pay into the treasury of the State, for the use of the State, in addition to the tax then imposed by law on such

companies, a tax of three per cent. upon their net earnings or income received from all sources during the preceding year, with the proviso that when a line of railroad or canal belonging to any company liable to the tax lay partly in the State and partly in an adjoining State or States, the part or share of such net earnings or income of the company only should be subject to the tax as would be in that proportion to the whole net earnings or income of the company which the length of the road or canal within the limits of the State should bear to the whole length of such road or canal. It will be perceived that this act, with the exception of the distinction between net earnings and gross receipts, is practically identical with the act of the State of Maine. The fourth section of the act provided for a tax of one-quarter of one per cent. upon the actual cash value of every share of its capital stock, and contained a proviso similar to that of the first section. Taxes were assessed by the State of Delaware under both of these sections, and also under another section, taxes were imposed for the use of the rolling stock of the railroad. The circuit court adjudged the tax imposed for the use of the rolling stock to be invalid and enjoined its enforcement, but sustained the legality of the other taxes, and a decree in conformity with this ruling was entered, from which both parties appealed to this court. On the hearing in this court the State officers of Delaware withdrew their appeal, and the inquiry of the court was thus limited to the validity of the act so far as it imposed the taxes specified in its first and fourth sections. The tax imposed by the first section is the tax that is parallel to the tax at bar. Among other objections it was contended that the act conflicted with the power of Congress to regulate commerce among the several

States, and upon this point the court in the opinion say: "The tax imposed by the act in question affects commerce among the States and impedes the transit of persons and property from one State to another, just in the same way, and in no other, that taxation of any kind necessarily increases the expenses attending upon the use or possession of the thing taxed. That taxation produces this result of itself, constitutes no objection to its constitutionality." The court then referred to and quoted from, with approval, the case of *State Tax on Railway Gross Receipts*, and say: "As very justly observed by this court in a recent case: 'Every tax upon personal property or upon occupations, business or franchises, affects more or less the subjects and the operations of commerce, yet it is not everything that affects commerce that amounts to a regulation of it within the meaning of the Constitution.'" They say further in conclusion upon this point: "The exercise of the authority which every State possesses to tax its corporations, and all other property, real and personal, and their franchises, and to grade the tax upon the corporations according to their business or income or the value of their property, when this is not done by discriminating against rights held in other States, and the tax is not on imports, exports or tonnage or transportation to other States, cannot be regarded as conflicting with any constitutional power." This conclusion sustained the validity of the tax under section first of the act, and it is submitted that with the exception of the fact that the Philadelphia, Wilmington & Baltimore Railroad Co. upon which the tax was assesssed in that case, was a corporation created under the laws of Delaware so far as it existed in that State — and we shall submit, when we discuss further the situation of the Grand Trunk Railway and

the franchise enjoyed by it with relation to the State of Maine, that is not material — the case is precisely parallel in all of the essential features of the case at bar. We have not found this case anywhere doubted, denied or even criticised, and while it declares the same doctrine upon which the case of *State Tax on Railway Gross Receipts* is based, and as to the first section of the act is practically on all fours as to facts, and while the court in the case of *Philadelphia Steamship Co. vs. Pennsylvania supra* discussed and severely criticised one of the grounds upon which *State Tax on Railway Gross Receipts* was based, they do not anywhere in the opinion criticise the case of *Delaware Railroad Tax*. This failure to criticise the case was not the result of its being overlooked by either counsel or court, as the case is cited and relied upon to sustain one of his propositions by the attorney general of Pennsylvania, as appears by his reported brief, p. 329.

The case of *Baltimore & Ohio Railroad Co. vs. Maryland, 21 Wall 456*, is also very strongly in point upon the proposition that the State has a right to tax in this manner the value of the franchises exercised by a railroad corporation engaged in inter-State commerce. In that case the court held that the stipulation contained in the charter of the Baltimore & Ohio Railroad Co. that the company at the end of every six months should pay to the State one-fifth of the whole amount received for the transportation of passengers, the corporation being chartered for the purpose of constructing a railroad from Baltimore to Washington, and the railroad being operated between those points, clearly being engaged in inter-State

commerce, was not repugnant to the Constitution of the United States. The point was raised in that case and insisted upon, that the provision in question was a regulation of commerce between the States.

In discussing that question the court said: "What amounts to the regulation of commerce between States, or to a discrimination against the citizens of other States, is often difficult to determine. In view, however, of the very plenary power which a State has always been conceded to have over its own territory, its highways, its franchises or its corporations, we cannot regard the stipulation in question as amounting to either of these unconstitutional acts. It is not within the category of such acts. It may incidentally affect transportation, it is true, but so does every burden of tax imposed upon corporations or persons engaged in that business. Such burdens however imposed *diverso intuitu*, and in the exercise of an undoubted power. The State is conceded to possess the power to tax its corporations, and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make on its customers. There the State has an undoubted power to exact a *bonus* for grant of the franchise, payable in advance or *in futuro*, and yet that *bonus* will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case indeed is nothing more or less than a bonus, and so long as the rates of transportation are entirely discretionary with the State such a stipulation is clearly within their reserved powers." Why then is not the tax imposed at bar a bonus of the same kind, and for

the same reasons? In distinguishing the tax or the payment to the State in that case from the tax regulating commerce, the court say: "The exercise of power on the part of a State is very different from the imposition of a tax or duty upon movements or operations of commerce between the States. Such an imposition, whether relating to persons or goods, we have decided the States cannot make, because it would be a regulation of commerce between the States in a matter in which uniformity is essential to the rights of all, and therefore requiring the exclusive regulation of Congress. It is a tax because of the transportation and is therefore virtually a tax on the transportation, not in any sense a compensation therefor, or for the franchise enjoyed by the corporation that performs it."

The court held in that case that the stipulation that the company should pay one-fifth of the whole amount received for the transportation of passengers was not a tax because of transportation, or on the transportation, and was therefore valid. How can it properly be said that the tax in the case at bar, being only a certain percentage instead of one-fifth of the whole amount received for transportation, is any more a tax on the transportation and therefore void? It is to be observed further in the case last cited that no attempt was made to confine the fifth received for transportation to the limits of the State of Maryland, but in terms, and in fact, as applied, the statute required one-fifth of the whole amount received for the transportation from Baltimore to Washington, thus operating obviously *extra territorially*, a condition of things which, as we have already shown, does not exist at bar. If a tax then could

be sustained under those circumstances, *a fortiori*, should the tax at bar be sustained? We do not find that this case has been denied as an authority or that it has received anything like adverse criticism at the hands of this court. It may be contended, however, that even though the last two cases upon which we rely have not been adversely criticised by this court, the case of *Fargo vs. Michigan*, *supra*, and *Pennsylvania Steamship Co. vs. Pennsylvania* are directly in point against the plaintiff, and announce the doctrine which controls the case at bar, to which, if their conclusions are inconsistent with it, the cases upon which we rely must give way.

In addition to the reasons already indicated in the discussion of these two cases, we submit the following suggestions which we think establish with additional clearness the distinction between those cases and the case at bar. In *Fargo vs. Michigan* we have already shown that the Merchants' Despatch Transportation Co. were not exercising any franchise of any kind under the authority of the State of Michigan. At bar a valuable franchise is possessed and exercised by the defendant, and we shall submit that upon this point there is no decision of this court that establishes any doctrine adverse to the proposition maintained by the plaintiff. In that case the tax was assessed upon "the gross receipts which the company had returned to the commissioner as money received for the tronsportation of freight from points without to points within the State of Michigan, and from points to points without that State," and were not confined or attempted to be confined to the gross receipts, or the proportional part of the gross receipts

received within the State. At bar the gross receipts are expressly confined to the limits of the State. The opinion in that case expressly eliminates the element of a franchise as entering into the tax then being considered. The facts in the case were clearly such that the element of franchise could have had nothing to do with determining the result of the case. As to this element of franchise it is clear that there is a plain and substantial distinction running through all the cases which we have discussed. No tax has been held invalid where it appears to have been based upon the value of a franchise granted by or used under the authority of the State imposing the tax, and this we submit is clearly the case at bar. In *Philadelphia Steamship Co. vs. Pennsylvania* the fact is also disclosed that this important element of franchise was absent in the most essential sense in which the right can be enjoyed by a *quasi* public corporation. In this respect there is very broad and well-recognized distinction between the franchises of a railroad and that of an ordinary corporation, and it is well stated by a respectable legal author: "The franchises of a railroad corporation are embodied in the right conferred by its charter to do and perform certain acts which, except for such grant, would be illegal. Among these is the right to form a corporation, the right to take lands for the construction of its road, the right to operate its road, and generally to perform the functions of a railroad corporation. These franchises are derived exclusively from the charter or the statute under which they are formed, and may be classified as prerogative and ordinary, and the distinction between these classes is of the highest importance. Prerogative franchises are those which arise from the special grant and cannot be regularly exercised

within the State either by an individual or corporation without such speclal authority, and consequently such as can only be exercised within the jurisdiction conferring it, and of this character are those specifically named supra in this section." That is, " the right to take lands for the construction of its road, the right to operate its road, and generally to perform the functions of a railroad corporation." *(Wood's Railway Law, p. 25).* And again, " Indeed, the right to build a railroad and use it for the runniug of trains, and to charge for the transportation of passengers and freight over it is a prerogative franchise which can only be conferred by special grant, and as an equivalent for the granting of which the sovereign power is necessarily clothed with the power to exercise a species of supervision and control which it does not possess in the case of ordinary private corporations." From the same authority, p. 9: " It can hardly be necessary to elaborate this proposition in order to impress this distinction of the highest importance between prerogative and ordinary franchises. An ordinary franchise is obviously the franchise of becoming and being a corporation. It is clear that the prerogative franchise referred to is of vastly more importance and of infinitely greater value than the ordinary franchise. Without the prerogative franchise no railroad corporation could exercise the vast powers and the *quasi* public rights with which it must necessarily be endowed in order to accomplish the all-important purposes of its organization. Nor would it without the possession of these franchises assume the onerous duties and responsibilities to the public and subject itself to the State control, all of which elements are necessarily involved in the proper and safe prosecution of its business in serving the public. It is this

great element of prerogative franchise which we believe to be one of the determining points in the case at bar. In the case last cited the steamship company had only an ordinary franchise. It was a steamship company organized for the purpose of navigating the high seas. It had no use for, and did not require for the successful prosecution of its intended business, any of the prerogative franchises. The rights which the State possessed as against this steamship company possessing this ordinary franchise were of very much more limited character than the rights possessed by the State as against the railroad corporation enjoying and exercising that higher and more valuable prerogative franchise.

While the court did not have their attention called to this great distinction in the nature of the franchise enjoyed by the various corporations, and did not therefore discuss that element, they do recognize in the opinion, distinctly, that the element of franchise did not properly enter into the determination of the question before them. It is very clear that in discussing this question the court in that case had in mind only the ordinary franchise, such as was enjoyed by the steamship company, as they say, p. 342: "It certainly could not have been intended as a tax on the corporate franchises, because by the terms of the act it was equally laid on the corporations of other States doing business in Pennsylvania," thus clearly having in mind only the ordinary corporate franchise of being a corporation, evidently not referring to the great *quasi* public rights which are the distinctive elements of the prerogative franchise.

At bar we contend that the tax in this State is assessed upon the prerogative franchise which, until the execution of the lease, was held by the Atlantic & St. Lawrence Railroad Co. from the State of Maine, and that now after the execution of this lease by the express authority of the State of Maine, is possessed, exercised and enjoyed by the Grand Trunk Railway Co. Undoubtedly the Atlantic & St. Lawrence Railroad Co. still retains the ordinary franchise, that of being and remaining a corporation. Upon authorities hereafter to be submitted we think it will clearly appear that it did not retain the prerogative franchise, but that it passed to the defendant corporation by the execution of the lease. In this respect the case at bar differs most radically from that of the *Steamship Company vs. Pennsylvania*. No reason is perceived when it is admitted that the tax may be rightfully assessed upon the value of the franchise, why a tax may not be rightfully assessed upon both the ordinary and the prerogative franchises. Each possesses value. Undoubtedly the prerogative franchise is infinitely more valuable than the ordinary franchise. Each are derived from the State. By the granting of the prerogative franchise the State parts with extremely valuable rights, and it is when granting such a franchise, if ever, that the court should certainly hold that the State reserves the right to tax it in accordance with its value. If both the ordinary and prerogative franchises are legitimate subjects of taxation, no reason is perceived why when the exercise and possession of such franchises are for the time being divided, the ordinary franchise being enjoyed by the original corporation and the important prerogative franchise being enjoyed and exercised by another corporation, each by the express authority and permission of

the State, each franchise is not under such circumstances equally subject to State taxation. If this be true what reason can be urged why the State has not the right to tax in this manner the franchise occupied, possessed and enjoyed by the Grand Trunk Railway Co. by virtue of this lease? Moreover, in the steamship company case the tax was assessed upon all of the gross receipts of the steamship company, and these receipts were earned by the steamship company upon the ocean and on the navigable waters of the United States between the State of Pennsylvania and other States of the United States and foreign countries, and upon the charter and hire of the steamships to other parties in such trade and business, and no part of said gross receipts were received for the transportation of freight and passengers between places within the State of Pennsylvania, or for the hire and use of such steamships within the State of Pennsylvania. Not only was no effort made to confine the gross receipts upon which the tax was assessed within the limits of the State of Pennsylvania, but it is obvious that with the exception of an extremely small fraction, all of the gross receipts taxed must have been actually earned beyond the territorial jurisdiction of the State of Pennsylvania. And here again is a substantial distinction between that case and the case at bar, inasmuch as the tax at bar is expressly limited to the limits of the State, or the proportion of the gross receipts received therein.

For these reasons we must submit that when the cases of *Fargo vs. Michigan* and the *Philadelphia Steamship Co. vs. Pennsylvania* are confined to the precise facts before the court

in each case, that neither of them can be held to be in point against our contention. While no one can examine the opinions of this court during the last 15 years upon this question of inter-State commerce without becoming impressed with the obvious tendencies to enlarge the doctrine and limit the power of the State to regulate or affect in any way commerce or its instruments, we think that the fact that in the two most recent cases in the United States that have been announced by the court, that of *McCall vs. The People of California, 136 U. S., 104*, and *Norfolk & Western Railway vs. The Commonwealth of Pennsylvania, 136 U. S., 114*, where the court passes adversely, under this clause in the Constitution, upon statutes imposing license taxes, three of the justices dissented in each case may indicate that the doctrine applicable to these cases has been extended as far as a fair construction of the Constitution will authorize the court to go. It seems to us that the limit has been reached in this case and that unless the court are prepared to still further extend it, that the cases upon which we rely are unshaken.

Now that Congress, by its recent inter-State commerce legislation, is regulating many of these matters and giving a legislative definition of the proper limits of the Federal and State powers, there would not seem to be any occasion for any extension of these Federal powers by construction on the part of the court.

That the Grand Trunk Railway Company *quoad* the State of Maine, and the franchises exercised by it, stands precisely the

same as though it were holding and exercising these franchises by original grant, appears clear from the doctrine laid down by *Murawetz*, certainly the most accurate, scientific and ablest writer upon the law of corporations. He says: "A company incorporated under the laws of several States has been held to be in each State a corporation created by that State, within the meaning of the revenue laws. Thus, a corporation chartered by the State of Indiana, and afterward invested with a new charter by the State of Illinois, is an Illinois corporation within the meaning of a statnte of Illinois purporting to tax all corporations created under the laws of that State. It is obviously a reasonable construction of a statute, purporting to regulate all railroad companies incorporated by a State, to hold that such statute applies to foreign companies re-incorporated by the State or *permitted to exercise their franchises and operate a line of road within its territory*." *Murawetz on Private Corporations, 2d. Ed., Sec. 998.* The doctrine announced in this text is, we think, fully sustained by the authorities which he cites. The italics are ours, and we submit the clause italicised applies in every particular to the defendant corporation.

To summarize. It is submitted with great confidence that if upon no other ground the tax at bar can be sustained upon the ground that it is a tax upon the value of the prerogative franchise which is enjoyed, operated, and its value ascertained by the Grand Trunk Railway Company by virtue of the express permission of the State of Maine. Such a conclusion will be in harmony with the obvious contemplation of the parties to

the lease under which the Grand Trunk Railway Company exercises these franchises, as provision was therein made for the payment of just such a tax by the Grand Trunk Railway Company and a deduction of the amount so paid from the rent reserved. No equity obtains in favor of the Grand Trunk Railway Company under this proposition. Such a tax is, in practical effect, assessed upon the Atlantic & St. Lawrence Railroad Campany, upon the person of its agent, expressly constituted for that purpose. The cases of *State Tax on Railway Gross Receipts*, *The Delaware Railroad Tax*, and *Baltimore & Ohio Railroad Company vs. Maryland*, upon this proposition of the right to assess a tax upon the value of a railroad franchise, and to determine its value by an ascertainment of either its net or gross receipts, have not been questioned or criticised, but have been recognized as well-considered authority.

It is submitted that the method provided in the statute of determining the value of the franchise upon which this tax should be assessed is one that is eminently fair and just to the corporation, though it may be argued that it is in fact, by its method of application, a mere tax upon the use of the franchise. In the language of the court in *State Tax on Railway Gross Receipts* the tax at bar "imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise."

That the actual use of a franchise from time to time is the fairest and surest test of its actual value seems obvious. A

franchise might be granted to operate a railroad between certain defined points. Different ideas might well be entertained as to the value of such a franchise. No certainty could be reached in that respect until actual operation had demonstrated its value. A valuation fixed at the time of granting might be enormously large or small, and great injustice might result to the corporation. If an arbitrary value fixed when granted might happen to be the true value; then, it by no means follows that it would continue as the true value. Great industries might be built up and cities and towns developed that would infinitely enhance its value. On the other hand, existing industries might be ruined and trade and business be directed into other channels by compelling causes, and a magnificent enterprise be rendered practically worthless. In other words, a franchise such as we are discussing as to this great element of value, and its duty to contribute its share of the public burdens, is just as much the subject of fluctuation and change as all kinds of property, and to fix upon a franchise an arbitrary value having no relation to its varying value would be grossly unjust. How, then, shall its value be determined? As that of all other property is determined. By its income or dividend paying power, or its earning power, which is the same thing. It is upon this basis that the act at bar determines the value of this franchise, and we submit that it is upon the only rational and practicable basis of which this defendant cannot successfully complain. The exercise of these prerogative franchise rights by the defendant demonstrates the value and creates the occasion when the right and duty of the State to step in and determine the value of these prerogative franchises upon the data thus furnished, upon which the defendant should bear its fair proportion of the public burdens.

Extensive and valuable rights and privileges, the enjoyment of which is possible only by public permission, necessarily and properly involves correspondingly great public duties and obligations. The one is the proper correlative of the other. No reason is perceived why full and legitimate operation cannot be given to these principles at bar and the validity of these assessments be sustained. If the fact that the Maine statute declares that this tax is imposed "for the privilege of exercising its franchise in the State" is relied upon as in effect making this a tax upon the business of the railroad and therefore rendering it unconstitutional, we submit that the language is to receive a construction that will sustain the assessment, if consistent with the language of the statute and the peculiar nature of the subject matter of taxation. The considerations which we have submitted show, we think, clearly, that the "privilege of exercising its franchise" is all that gives it value, and is the only practical method of ascertaining its value from time to time. A franchise is nothing but a privilege or right, and is incapable of enjoyment without the right of exercising the privilege or right. Without such exercise it is valueless. When we say a corporation shall have the privilege of exercising its franchise we merely declare that it can enjoy to its legitimate extent the peculiar property rights which were conferred upon it when the franchise was granted to it; that it can possess, have and enjoy to the full extent incident to such property the property thus granted to it. We cannot conceive of a franchise with the universal elements of value incident thereto where the corporation would not have the full and unrestricted right of "exercising its franchises." When the legislature of Maine, therefore, say that the tax is for the privilege of

"exercising its franchises in the State" it merely declares that the tax is imposed upon the corporation upon the assumption that the corporation possesses and enjoys its property in its franchises without any restriction as to its use and to its full and complete value; that the valuable franchise entrusted to the corporation is enjoyed without limitation or restriction, and receives the benefit of its full value, and that therefore inasmuch as the full value of its property is thus assured to the corporation, this same full value furnishes the criterion upon which its fair proportion of the public burdens should be determined. This reasoning is in harmony with the language of the court in *State Tax on Railway Gross Receipts*, when it says "Nor is it deniable that gross receipts may be a measure of proximate values," referring to the value of a franchise. It is the same proposition which the court say in *Fargo vs. Michigan* "has often been set up as a defence to the allegation that the taxation was such an interferance with commerce as violated the constitutional provision now under consideration," the obvious inference being from the whole case that such a defense is valid. The fundamental difficulty in the proposition is the illogical attempt to establish a substantial distinction between a franchise and the *use* of the privileges or rights which are all there is of the franchise, without which the franchise is nothing but a name. It is impossible to predicate the idea of value or property upon a franchise and at the same time eliminate the idea of use of the franchise. No proper distinction exists between a franchise and its use. A franchise involves a use of the rights and privileges which constitute it. Can we conceive of a franchise to build a road without the use of the right to build the road; a franchise to exercise the right of

eminent domain, without the use of the right to exercise eminent domain; a franchise to take tolls without the exercise of the right to take tolls? When we eliminate the idea of exercise of the privileges or use of a franchise we destroy the franchise itself. We take the substance and hardly leave the shadow. We think it clear that this plausible and assumed, but clearly impossible distinction, has crept into many of the cases and is responsible for much of the general language that may be found in the cases, which would seem upon an ordinary reading adverse to the conclusions which we have sought to maintain. A tax, then, upon the "exercise" of a franchise is a tax upon the value of the franchise itself, and cannot be fairly construed to mean [illegible] though it may be, unscientifically described and superficially viewed, might appear to indicate another result. Whatever conclusion might be reached by the Court by a popular and superficial reading of this statute, we submit that a careful examination of the statute as a whole, in connection with the subject matter and the objects sought to be attained, lead fairly to the conclusion that this tax is in legal effect upon the value of this franchise. Such a tax, the authorities upon which we rely we submit amply justify.

Respectfully submitted,

Attorneys for Appellants.

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# Supreme Court of the United States.

OCTOBER TERM, 1890.

NO. 302.

**STATE OF MAINE, PLAINTIFF IN ERROR,**

***vs.***

**THE GRAND TRUNK RAILWAY COMPANY, OF CANADA.**

REPLY TO THE BRIEF AND ADDITIONAL BRIEF OF THE DEFENDANT IN ERROR.

# Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 302.

*STATE OF MAINE, PLAINTIFF IN ERROR,*

*vs.*

*GRAND TRUNK RAILWAY COMPANY OF CANADA.*

REPLY TO THE BRIEF AND ADDITIONAL BRIEF OF THE DEFENDANT IN ERROR.

A careful examination of the two briefs of the defendant in error, leads to the conclusion that there is no occasion for an extended discussion, on the part of the plaintiff in error, as, so far as the reasoning went in the first brief of the plaintiff, there seems no occasion for any farther analysis or elaboration of the principles and authorities upon which we rely. There are, however, some propositions, assertions and omissions in the "reply" of the defendant to which we should call the attention of the Court.

1.

What answer is made by the defendant to the authorities relied upon by the plaintiff?

One of the cases relied upon is attacked, and only one: that of the case of *State Tax on Railway Gross Receipts*. The first answer is: "This record presents no state of facts such as would bring it within the scope and authority of that decision even if it was unquestioned law." (Brief for defendant, P. 11.) This is an assertion on the part of the defendant that is not attempted to be sustained by any analysis or argument. Defendant does not anywhere attempt to point out the elements which so completely distinguish it from the case at bar. Possibly the fact that they could not be successfully pointed out may account for this omission. As to the proposition that the tax at bar is really a tax upon the value of the franchise, upon which the Court will perceive we mainly rely, with the exception of the fact that in the case of *State Tax on Railway Gross Receipts* the tax was assessed upon a corporation created by the State that assessed the tax, and at bar the tax is assessed not upon a corporation created by the State of Maine, but upon a franchise granted by the State of Maine, possessed and occupied and enjoyed by the defendant "by force of its lease authorized by the Legislature of the State of Maine," as defendant says in its brief, P. 8, we submit that case is on all fours with that at bar. As to the exception we submit that we have shown in our first brief, P. 15, 16, 17, 26, 27, *et seq.*, that there is no legal distinction between the case at bar and that of *State Tax on Railway Gross Receipts*.

The second answer is that the case of *State Tax on Railway Gross Receipts* "has been so questioned that it is no longer a conclusive authority even in a similar case, and to-day would not, in its present form, find its way into the reports of this Court." This point was examined fully in our first brief.

A most striking and suggestive omission in the reply is to be noted here. We rely in addition to the case of *State Tax on Railway Gross Receipts* upon the *Delaware Railroad Tax 18 Wall. 206* and *Baltimore & Ohio Railroad Co. v. Maryland 21, Wall. 456.* We find no intimation in the "reply" that these cases are not in point, as claimed by us, or any suggestion that they have been questioned, or overruled, or even any prediction that they would not find their way into the reports in their "present form." Defendant practically admits them to be in point and authority.

II.

We should call attention to some fallacies and some erroneous assertions in the defendant's brief. When seeking to evade the force of our proposition as to a tax upon the franchise, defendant asserts that it does not hold its franchises in Maine under a Legislative grant, when they say (P. 12, brief) "if it had possessed its franchises by virtue of grants made by the Legislature of the State of Maine," * * * "it would present a very different question from that raised by the facts in this record." When, however, upon another branch of their case, they attempt to seek cover under the original exemption from taxation contained in the charter of the Atlantic & St. Lawrence Railroad Company, they use entirely different language, in describing the natnre of their rights in and title to the franchise. Then they say "It seems to be perfectly clear that this privilege was conferred by the charter of the Atlantic & St. Lawrence Railroad Company in the first instance, and was transferred to the Grand Trunk Railway Company by force of its lease, authorized by the Legislature of the State of Maine, and is not dependent upon any *subsequent legislative grant*," (defendant's brief, P. 8). It is clear that for the purposes of that proposition the defendant claims that it holds by a legislative "grant," in the lease, and not by "any *subsequent* legislative *grant*." And it is under this "grant" that they claim the benefit of the original exemption. It is unfortunate for the defendant that in the same brief, in order to sustain one proposition, it must upon the same state of

facts, establish a "grant" to sustain one proposition and deny it in order to sustain a different proposition. There can be no doubt but that the defendant does hold the franchises of the Atlantic & St. Lawrence Railroad Company, as we argued in chief and as defendant's counsel asserts in his first brief. That it does not hold by "grant" is a proposition that first sees the light, in the "reply," and is clearly born of the exigencies of the case, in answering the propositions upon which we rely. We shall show shortly that immunity from taxation was not granted.

In endeavoring to distinguish the case at bar more completely from the first ground of the decision on *State Tax on Railway Gross Receipts* that the tax is "laid upon a fund which has become the property of the company, mingled with its other property," counsel for defendant is betrayed into making several assertions which do not seem to us sustained by the record. We agree most cheerfully with him when he says: "I cannot see how the Court can pass upon any case except that presented by the record." (P. 14 defendant's brief,) and suggest that he should have followed more closely his own standard. He says the defendant "had no office in the State of Maine," but the case finds affirmatively that it "has its principal place of business at Montreal, in the Dominion of Canada." (Defendant's brief, P. 12.) There is no statement in the record that it has "no office in the State of Maine." The fact that it finds affirmatively that it has "its principal place of business at Montreal" suggests the necessary inference that it has other places of business elsewhere, and we submit that although the record does not so state in terms, the inference is irresistable that it has an "office" and another place of business at the other terminus of its line, Portland, Maine. He says: "The receipts went to the home office." (Defendant's brief, P. 7.) Is there anything in the record to show it? Not a line. On this point defendant's counsel also asserts: "There is not one word in the record to show that the defendant in error transacted its business as a corporation in any other jurisdiction than that where it had its domicil" and that "the presumption and the fact is, that its treasury was at its principal place of business at Montreal." (Defendant's brief, P. 21.) What warrant has the counsel

for asserting that "the fact is, that its treasury was at its principal place of business at Montreal"? There is nothing in the record which justifies it. On the contrary, a careful examination of the record discloses that they had a local treasury at Portland. The foundation of this writ of error, its service on the defendant, shows that fact. The return of the officer shows that this writ was served "by giving in hand to Charles E. Barrett, of Portland, in said District of Maine, who is *local treasurer* of said Grand Trunk Railway Company, a true and attested copy hereof." (Record, P. 2.) We have seen no suggestion that the writ of error was not properly served. If they have a "local treasurer" in Portland, it would seem to follow that they not only have an "office" but a local treasury also in Portland. Having a "local treasurer" and a local treasury, can there be any doubt on this branch of the case that much more than the gross receipts taxed at bar became a part of the property of the defendant in Portland, always bearing in mind that only a small proportion of the whole line from Portland to Montreal is in Maine and the presumption that very much more than that proportion of gross receipts were actually received by the local treasurer at the Portland terminus?

## III.

In answer to our proposition that this is a tax upon the value of the franchise, the counsel for defendant invokes what he erroneously supposes is an exemption or immunity from taxation, possessed by the defendant under its lease. The larger part of his first brief is made up of a discussion of the same question. The question is so obviously foreign to the discussion at bar that we should not have referred to it, did it not appear that by a reiteration of the proposition he seems to be of the opinion that it has some connection with the issue, and that the supposed exemption is inconsistent with this branch of our contention.

The answer to defendant's contention on this point is that the Atlantic & St. Lawrence Railroad was not authorized to transfer any immunity

from taxation, and did not attempt to do so. The record shows that it was authorized to "enter into and execute such a lease of the railroad of said Company," &c., (Record P. 10,) authority to lease the railroad and nothing more. The case shows that they executed "such lease" and nothing more (Record P. 11.)

That such a transaction does not transfer an exemption from taxation is perfectly well settled.

*Pickard v. E. Tenn., Va. & Ga. R. R. Co., 130 U. S. 637.* This disposes of the "agreement solemnly entered into by the Legislature of Maine" (defendant's brief P. 17) which would be violated by our contention, as it shows that no such agreement was ever entered into.

IV.

In his "reply" counsel for defendant for the first time complains of Section 7 of the original Statute of 1881, under which the tax at bar was imposed, and concludes that there is no question but that it is "a regulation of interstate commerce in the present case" (defendant's brief P. 20.) Inasmuch as it does not appear that any act has been done under this section, or that the defendant has been in any way interfered with or oppressed by virtue of any of its provisions, we are at loss to perceive what relevance it has in a discussion of the issue at bar. When the railroad commissioners institute the inquiry contemplated, or the defendant is indicted or sued in an action of debt for the penalty provided on a failure to comply with its provisions, it seems to us it will be early enough to ask this Court to construe that section. "Sufficient unto the day is the evil thereof." We have no occasion to anticipate these questions in this discussion.

Finally, as to the proposition upon which we principally rely that the defendant is for the time being, at least, the owner of the franchises of the Atlantic & St. Lawrence Railroad Company and that the tax is really and in legal effect upon this franchise, we may safely accept the statement of the defendant's counsel in his first brief as a definition of the legal status of the defendant *quoad* this franchise. He says: "The Atlantic & St. Lawrence Railroad Company must have issued bonds secured by mortgage, and had then leased its road property and rights, including its franchises, to the defendant corporation." And again: "In fact, the right to operate the railroad itself, to collect fares, to regulate rates of freight, and enjoy other privileges which are exercised under the lease of the Grand Trunk Railway and the Atlantic & St. Lawrence Railroad all fall within the meaning of that term": referring to "franchise." This is the "franchise" which we contend is subject to taxation, and it answers well to the prerogative franchise which we discussed in the former brief.

C. E. LITTLEFIELD,

*Attorney General of Maine.*

Office Supreme Court U. S.
FILED,
MAR 23 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 302.

STATE OF MAINE,

PLAINTIFF IN ERROR,

*v.*

GRAND TRUNK RAILWAY COMPANY OF CANADA,

DEFENDANT IN ERROR.

# DEFENDANT'S BRIEF.

# UNITED STATES SUPREME COURT.

STATE OF MAINE, PLAINTIFF IN ERROR,

*vs.*

GRAND TRUNK RAILWAY COMPANY OF CANADA, DEFENDANT IN ERROR.

## DEFENDANT'S BRIEF.

This is a writ of error from the Circuit Court for the District of Maine. The suit is an action of debt brought to recover certain taxes for the years 1881 and 1882, assessed upon the defendant corporation by the Governor and Council of the State of Maine, under the authority of the provisions of Chapter 91 of the Laws of the State of Maine of 1881, and embodied in the Revised Statutes of said State, Chap. 6, Sect. 41, *et seq.*

The court found that the defendant in error was and is a foreign corporation, incorporated under the laws of the Province of Canada, and that its principal place of business was at Montreal, in the Dominion of Canada.

That from the year 1853 until the present it possessed and operated a line of railroad, extending from Montreal to Island Pond in the State of Vermont, and from Montreal through the Dominion of Canada to Detroit in the State of Michigan.

That in 1855, requisite legislative authority having previously been procured therefor, the defendant in error took a lease for nine hundred and ninety-nine years of the Atlantic & St. Lawrence Railroad, extending from said Island Pond, in the State of Vermont, through the States of Vermont, New Hampshire and Maine, to the city of Portland, in said State of Maine. And from that time has managed, controlled and operated the leased railroad with all its appurtenances as a part of their said line of railroad from Portland, Me., to Detroit, Mich.

That, in 1874, the defendant in error acquired the Lewiston & Auburn Railroad, extending from the point of junction with the defendant's railroad to the city of Lewiston, a distance of five and one half miles, and that subsequent to 1872 the defendant leased the railroad extending from Norway to South Paris, a distance of one and one half miles, and that all these roads have been controlled and operated by the defendant in error as one line, for the purpose of transportation of passengers and freight.

The court further found that the Atlantic & St. Lawrence Railroad was built from Portland, Me., to Island Pond, Vt., under the authority of an act of the Legislature of Maine, approved Feb. 10, 1845, and by authority of legislative enactments of the States of New Hampshire and Vermont, by which it was duly constituted a corporation within said States. The Atlantic & St. Lawrence Railroad so constructed was eighty-two and one half miles in the State of New Hampshire, and fifteen miles in the State of Vermont. That by its act of incorporation it was vested with the power and authority to "continue and prolong its railroad beyond the line to the State of Maine and the boundary of Canada, with authority to purchase, take and hold lands, or the right of way over lands, for the purpose of constructing said railroad, provided that this act be done consistently with the laws or regulations of the State or States over which said railroad would pass in its continuation." The necessary authority for such continuation was obtained from the States of New Hampshire and Vermont.

That by the authority granted by the Legislature of Maine to lease the Atlantic & St. Lawrence Railroad it was enabled "to make such lease, or contract in the nature of a lease, as would enable the lessee thereof to maintain and operate by means of said railroad, and other roads in extension of the same, a connecting line of railroads from the Atlantic Ocean in Portland, Me., to the city of Montreal, in the Province of Canada, and thence to the westerly part of said Province." The lease made by virtue of this authority was confirmed and approved by the Legislatures of New Hampshire and Vermont.

The original charter granted by the State of Maine contained the following section : —

"SECT. 16. All real estate purchased by said corporation for the use of the same under the fifth section of this act shall be taxable to said corporation by the several towns, cities and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof, in the places where they reside and have their home. And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the Legislature; from and after which time one moiety, or such other portion as the Legislature may from time to time determine, of the net income from said railroad accruing thereafter over and above ten per centum per annum first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the State, for the use of the State. And the State may have and maintain an action against said corporation therefor to recover the same. But no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises."

By Section 18 of the charter, the Legislature was given the right to inquire into the doings of the corporation, and its use and employment of the privileges and franchises granted to it, and with the right also "to correct and prevent abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered, limited or restrained without the consent of the corporation, except by due process of law."

By Chapter 91 of the Laws of Maine passed in 1881, and embodied in the Revised Statutes of 1883, Chap. 6, Sects. 41, *et seq.*, it is provided as follows: —

"SECT. 2. Every corporation, person or association operating any railroad in the State shall pay to the treasurer of State, for the State, an annual excise tax for the privilege of exercising its franchises in the State, which, with the tax provided for in Sect. 4, is in place of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the State from the taxes received under this and the six following sections to the several cities and towns in which, on the first day of April in each year, is held railroad stock exempted from other taxation, an amount equal to one per cent on the value of such stock on that day, as determined by the governor and council; *provided*, *however*, that the total amount thus apportioned on account of any railroad shall not exceed the sum received by the State as tax on account of such railroad.

"SECT. 3. The amount of such annual excise tax shall be ascertained as follows: The amount of the gross transportation receipts, as returned to the railroad commissioners for the year ending on the thirtieth day of September preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile do not exceed two thousand two hundred and fifty dollars the tax shall be equal to one quarter of one per cent of the gross transportation receipts; when the average receipts per mile exceed two thousand two hundred and fifty dollars, and do not exceed three thousand dollars, the tax shall be equal to one half of one per cent of the gross receipts; and so on, increasing the rate of the tax one quarter of one per cent for each additional seven hundred and fifty dollars of average gross receipts per mile, or fractional part thereof; *provided*, that the rate shall in no event exceed three and a quarter per cent. When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the gross receipts in the State, as herein provided, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross

receipts per mile, multiplied by the number of miles operated within the State."

By Section 7 of the Act of 1881, if the returns required by law are found insufficient to furnish the basis upon which the tax is to be levied, the railroad commissioners shall require such additional facts in the returns as may be found necessary. It is further provided that the railroad commissioners shall have access to the books of the railroad company to ascertain if the required returns are correctly made; and any railroad corporation, association or person operating any railroad in the State, which refuses or neglects to make the returns required by law, or to exhibit to the railroad commissioners its books for the purposes aforesaid, or makes returns which the president, clerk, treasurer, or other person certifying to such returns knows to be false, forfeits not less than one thousand, nor more than ten thousand dollars, to be recovered by indictment, or by an action of debt in any county into which the railroad operated extends.

Under and by virtue of this law the tax in question was levied. The returns required by law furnished by the Atlantic & St. Lawrence Railroad Company showed the transportation receipts of the Atlantic & St. Lawrence Railroad Company, over its entire line within the States of Maine, New Hampshire and Vermont to be, for the year ending June 30, 1880, $956,202.45, and for the year ending June 30, 1881, $1,018,667.33. Upon these gross receipts for transportation, the governor and council assessed for the year 1881 the sum of $9,569.66, and for the year 1882, the sum of $12,095.56. And this tax was laid, as alleged in said act for the privilege of exercising the franchises of said railroad in the State of Maine.

The writ alleges that the defendant "was and had been operating a railroad in the State, the same lying 'partly within and partly without this State,' and thereby became liable by law to pay to the State treasurer, for the use of said State, an annual excise tax for the privilege of exercising its franchises in the State of Maine, one half of said tax to be paid to said State of Maine on the first day of July, and the other half on the first day of October, next following the levy of the same."

These taxes were ascertained by dividing the gross transportation

receipts of the entire line of railroad within and without the State of Maine, by the number of miles operated to obtain the average gross receipts per mile. This last sum, multiplied by the number of miles operated within the State of Maine, gave the gross receipts upon which the tax was laid, and this sum was multiplied by the percentage as provided in the act above quoted.

I.

1. Cases recently decided by this court establish beyond question that the act of the Legislature of Maine, and the taxes imposed thereunder, are invalid, because they are in conflict with the exclusive powers of Congress under the Constitution of the United States for the regulation of commerce with foreign nations, and among the several States.

Constitution, Art. 1, Sect. 8, Clause 3.

*McCall* v. *California*, 136, U. S. 104, and cases cited.

*Lyng* v. *State of Michigan*, 135 U. S. 161, 166.

*Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 196.

*Sherlock* v. *Alling*, 93 U. S. 99, 102.

*Norfolk and Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114.

2. The only business of the defendant in error is interstate and foreign commerce, and upon the privilege of carrying on this business the tax is levied.

3. It cannot be said that this is a tax upon the receipts as property in the treasury of a domestic corporation. The defendant in error is a foreign corporation, and the case finds that its principal place of business is at Montreal. The receipts went to the home office. The statute does not base the tax upon that ground.

II.

The attempt to tax the property and franchises of Atlantic & St. Lawrence Railroad Company in the hands of the defendant in error is a violation of the contract contained in the charter under which the leased road was constructed. The franchises of the Atlantic & St. Lawrence Railroad Company are forever exempt from

taxation, except in the manner provided by the charter, and the question is, whether a law which in its necessary operation, when applied to the lessee of the Atlantic & St. Lawrence Railroad, is to impair the rights and privileges of the Atlantic & St. Lawrence Railroad, and which if valid at all must be valid as a tax upon the property and franchise and chartered rights of the Atlantic & St. Lawrence Railroad, can be sustained. The State has solemnly agreed with the Atlantic & St. Lawrence Railroad that it would tax in a certain way, and further that "no other tax than herein is provided shall ever be levied or assessed upon said corporation, or any of their privileges or franchises." It further agreed that all the real estate of the corporation shall be taxable by the several towns, cities and plantations in which the lands lie, in the same manner as land owned by private persons, and shall be estimated the same as other real estate of the same quality, in such city, town or plantation, and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate, and taxable as such to the owners thereof, where they reside. But by the law of 1881, the real estate of the Atlantic & St. Lawrence Railroad Company is taxed in another manner than provided by their charter, and instead of the stock being taxed as therein provided, another and different form of taxation is substituted, arbitrary in its kind and unequal in its effect, and the taxation which is thus imposed is made *a lien on the railroad operated, which takes precedence of all other liens and incumbrances.* How can it be said that such an act does not impair the obligations and chartered rights of the Atlantic & St. Lawrence Railroad Company? Prior to the passage of such act, no tax could be imposed except upon the real estate and stock, until the net income of the corporation should amount to ten per cent per annum.

Before the passage of the law of 1881, with the assent of the Legislature, the Atlantic & St. Lawrence Railroad Company must have issued bonds secured by mortgage, and had then leased its road property and rights, including its franchises, to the defendant corporation, receiving a valuable rental therefor, which rental was the first incumbrance and charge upon the property, and upon the defendant corporation. But by the very language of this act, all these privileges are abrogated and destroyed,

and another incumbrance, novel in its nature and imposition, is substituted for the rights of the Atlantic & St. Lawrence Railroad Company, and become the first lien upon the corporation.

I assume that no question can be made that the rights conveyed by its charter, to take tolls and to enjoy other privileges conferred by the government upon the Atlantic & St. Lawrence Railroad, fall properly and legitimately within the meaning of the term "franchise," as contained in Section 16 of that act. In fact, the right to operate the railroad itself, to collect fares, to regulate rates of freight, and to enjoy other privileges which are exercised under the lease of the Grand Trunk Railway and the Atlantic & St. Lawrence Railroad, all fall within the meaning of that term.

1 Black. Com. "Rights," Book II., p. 37.

Morgan *v.* Louisiana, 93 U. S., 217.

Railroad Company *v.* Georgia, 98 U. S., 365.

Now the purpose declared by the Act of 1881 is to tax corporations operating any railroad in this State, *for the privilege of exercising the franchises within the State.*

It seems to be perfectly clear that this privilege was conferred by the charter of the Atlantic & St. Lawrence Railroad in the first instance, and was transferred to the Grand Trunk Railway Company, by force of its lease authorized by the Legislature of the State of Maine, and is not dependent upon any subsequent legislative grant. When, therefore, the Legislature attempted to tax any of the franchises in the manner provided by the Act of 1881, it is not the franchises of the Grand Trunk Railway Company granted to it by the State, but the franchises of the Atlantic & St. Lawrence Railroad Company which has been transferred by the lease to the defendant corporation, that forms the basis of that tax, and we claim that the Act of 1881 is not only an impairment of the obligation of the contract entered into between the Atlantic & St. Lawrence Railroad Company and the State, but it is in direct violation of the provisions of such contract, and cannot be sustained.

The consideration of this last question may not be open in this case, and is not necessary to this decision.

A. A. STROUT,
*for Defendant in Error.*

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 302.

## STATE OF MAINE,

PLAINTIFF IN ERROR,

*v.*

## GRAND TRUNK RAILWAY COMPANY OF CANADA,

DEFENDANT IN ERROR.

## PETITION OF DEFENDANT IN ERROR

FOR

## REHEARING OF SAID CAUSE.

# SUPREME COURT OF THE UNITED STATES.

No. 302.

STATE OF MAINE, PLAINTIFF IN ERROR,

*v.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

And now comes the Grand Trunk Railway Company of Canada, at the term in which judgment in said cause is entered, and respectfully petitions the Court for a reargument and rehearing of said cause upon the following grounds: —

*First.* Because said cause is of great importance and presents for decision difficult questions of constitutional law.

*Second.* Because the decision in said cause has been rendered after written argument, and without counsel being heard orally before the court.

*Third.* Because the ground upon which the decision of the Court is based was not directly discussed by either counsel; on the contrary, counsel for plaintiff in error states the question thus: —

"Is a tax upon the gross transportation receipts in the State of Maine of a railroad lying partly within and partly without the State ascertained by multiplying its average gross receipts per mile for the whole length by the number of miles within this State, in conflict with Art. 1, Sect. 8, Part 3, of the Constitution of the United States? Is such a tax a regulation of or an interference with interstate and foreign commerce? We contend that it is not" (Brief of Plaintiff in Error, page 5).

It was further contended by plaintiff in error that the tax on the franchise could be maintained as a tax upon property, and a distinction was made between "common" and "prerogative" franchises;

and further, that such tax might be sustained as a tax upon earnings of the defendant in error remaining within the State of Maine.

*Fourth.* Because the case of *Home Insurance Company* v. *New York*, 134 U. S. 594, was not cited or considered by either counsel.

*Fifth.* Because, in connection with the opinion of the Court as given, the contract of exemption from this taxation contained in the charter of the Atlantic & St. Lawrence Railroad becomes important, but was not considered in the decision rendered.

*Sixth.* Because, notwithstanding the language of the statute, the case clearly shows that the tax in question could not have been an "excise tax."

*Seventh.* Because, if such tax could be held to be an excise tax its imposition in the present case would be a violation of the contract contained in the charter of the Atlantic & St. Lawrence Railroad, and prohibited by the provisions of the constitution.

*Eighth.* Because, if it is a tax upon the defendant in error for doing business or exercising its franchise within the State of Maine, then it would be incompetent for the Legislature of Maine to impose a new burden upon the Grand Trunk Railway as the lessee of the Atlantic & St. Lawrence Railroad, under the express authority and with the consent of such Legislature previously granted, as shown by the Record.

*Ninth.* Because, notwithstanding the language of the statute, the tax in question was, in fact, a tax imposed upon the defendant in error because of its doing the business of carrying freight and passengers between the several States and the Dominion of Canada.

*Tenth.* Because, it would be just and reasonable that these important constitutional questions should be finally decided only after counsel has had the fullest opportunity to be heard upon the real questions arising out of the Record.

GRAND TRUNK RAILWAY
COMPANY OF CANADA,
*By* A. A. Strout *its Attorney.*

I, Almon A. Strout, attorney of Record for the Grand Trunk Railway Company of Canada in the above-entitled cause, do certify that the foregoing petition is not intended for delay, that it is made in good faith, and that I believe justice to the parties requires that a rehearing and reargument should be granted in said cause

Almon A.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 29.

## STATE OF MAINE,

PLAINTIFF IN ERROR,

*v.*

## GRAND TRUNK RAILWAY COMPANY OF CANADA,

DEFENDANT IN ERROR.

## ADDITIONAL SUGGESTIONS WHY REHEARING OF SAID CAUSE SHOULD BE GRANTED.

A. A. STROUT,

*Attorney for Defendant in Error.*

# Supreme Court of the United States.

NO. 29.

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STATE OF MAINE, PLAINTIFF IN ERROR,

*v.*

THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

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## DEFENDANT IN ERROR.

### DEFENDANT'S SUGGESTIONS WHY REHEARING SHOULD BE GRANTED.

Assuming that the excise tax mentioned in the Act of the Legislature of Maine for 1881 denotes an impost for a license to "pursue certain callings," or "to exercise particular franchises" within the State of Maine, it still becomes necessary to examine the nature of the franchise to be exercised in order to determine whether under the designation of excise tax the Legislature by the tax authorized by the Act has imposed a burden upon interstate commerce, as that term has been construed by the Supreme Court.

I respectfully submit that the question is not whether in general the State may impose a tax upon a corporation created within its own limits, or a corporation doing business solely within its own territory, but whether in this particular case the occupation of the railroad is such that the transaction of its business under the legislative sanction and permission of the State, as contained in the charter, is a burden upon such business transacted between the several States or between the State imposing the tax and an alien jurisdiction.

Was the operation of the railroad in doing its business wholly within the State of Maine, or was it an operation which necessarily embraced other States, or the State of Maine and a foreign country?

It is necessary to arrive at the proper solution of this inquiry *in this case* as a matter of fact in order to determine whether the tax imposed by the State of Maine is prohibited by the Constitution

even if it is a tax imposed for the privilege of exercising corporate franchises in the transportation of persons and property by a common carrier from Maine through other States and a foreign country.

The answer to the question is stated in the findings of the Court below, and is capable of no other construction than that the exercise of the franchise granted by the Legislature of Maine to the Atlantic & St. Lawrence Railroad, and by it leased to the defendant in error, was a business wholly between different States and between the States through which the railroad passed and the Dominion of Canada.

Neither the charter nor the Act of 1881 attempts to separate the business of the road or confine it to business transacted within the limits of the State of Maine; they do not attempt to divide or discriminate the franchises exercised within from those without the State or confine the corporation to the right to transport persons and property within the limits of a single jurisdiction.

I do not contend that it would not have been competent for the State of Maine, when it created the Atlantic & St. Lawrence Railroad, to have imposed upon it a burden in the shape of taxation, had there been no provision of the Constitution conferring upon Congress the power to regulate commerce between the several States, and no provision contained in the charter providing: "but no other tax than herein is provided shall ever be levied or assessed upon said corporation or any of their privileges or franchises."

The question then recurs under this record: For what is the defendant in error taxed? The charter of the Atlantic & St. Lawrence Railroad containing its franchises was granted by the Legislature as far back as 1845; it contemplated a continuous route extending through the States of Maine, New Hampshire and Vermont, and with the legislative assent of each of those States. (See record.) It contemplated the business of transporting freight and passengers between these several States. I assume that the facts found in the record leave no other conclusion than this which I state.

In the charter of 1845, there was no condition prescribed and no burden imposed of the nature of the burden imposed by the Act of 1881, except those contained in Sect. 16 of the charter.

It will be observed that these burdens and conditions are in this Section clearly expressed, and are confined to the taxation of the

real estate purchased by the corporation created by the Act, the shares of the respective stockholders within the State of Maine and a moiety, or such other proportion as the Legislature might determine, of the net income of said railroad over and above ten per cent per annum, which was first to be paid to the stockholders, which moiety is to be annually paid over by the treasurer of the corporation as a tax into the treasury of the State for the use of the State. And it is further provided that no other tax shall be levied or assessed on said corporation or any of their privileges or franchises. They constituted the only conditions and burdens imposed by the State of Maine in any form for the privileges "exercising the franchises" granted at the time and the State solemnly agreed that no others should be imposed thereafter.

In this preliminary suggestion to the Court it requires no citation of authority or extended argument to show that this burden and these conditions set forth in the charter constituted a contract between the State and the corporation in relation to the burdens to be imposed upon it for the privilege conferred by its franchise of doing business within its limits. The first of these provisions evidently refers to burdens to be imposed upon the railroad by taxing its property *within the State of Maine*. How far the last burden mentioned in Sect. 16 of the charter would be repugnant to the provisions of the Constitution by which Congress is clothed with the power to regulate commerce between the several States is not a necessary subject of discussion; but it is sufficient to say that so much of these provisions of the charter as were valid constituted a contract between the State granting the charter and the corporation receiving it.

At the time of granting the charter to the Atlantic & St. Lawrence Railroad there was no power reserved by the State of Maine to alter or amend it; and in the case of the State *v.* Baltimore & Ohio Railroad, 48 Maryland Reports, 50, in a well considered opinion the Court held: "The exemption from taxation granted in the charter of the company was a contract between the State and corporators within the operation of the Constitution of the United States, and therefore beyond the power of a subsequent Legislature to repeal or in any manner repair." This has been with some modifications the

doctrine of the Supreme Court from the time of the Dartmouth College case down to the present.

What, then, was left to be taxed by the Legislature except the business done by means of the franchises granted by the State of Maine to the Atlantic & St. Lawrence Railroad for transacting business constituting interstate commerce even if it had a right to impose an additional tax in the face of its agreement that it would not do so?

Provision was made for the taxing of real estate, for taxing of stock and other property, and of taxing the business of the company (if such could be done) as a condition of granting the franchise. There was nothing left, unless it is said that the franchise itself is taxable by way of a privilege tax to be imposed for the privilege already granted under conditions in the charter of 1845. That privilege was the right to operate a railroad through the States of Maine, New Hampshire and Vermont, and to carry over it passengers and freight for compensation to be fixed by the railroad.

The proposition that this is not interstate commerce cannot be maintained, unless the repeated decisions of this Court are overruled. Therefore there was nothing left except this interstate business that was open to taxation by the State of Maine, because the State of Maine by its contract, as contained in the charter to the Atlantic & St. Lawrence Railroad, has said to the railroad: "You may build your road from the city of Portland through the State of New Hampshire to Island Pond, Vermont, for the purpose of conveying freight and passengers between these points for hire. The State has imposed upon you certain conditions and burdens which are plainly set out in this contract, and agrees that other than this it will never impose additional burdens by way of taxation." But it now says: "Notwithstanding this contract by which the State permits you to do this business constituting interstate commerce, the State will now impose a tax for the privilege of doing this business granted you by the charter of 1845 and exercised by you or by your lessee, the defendant in error." When the railroad replies that this is a tax upon the business of the road which is interstate commerce, and therefore prohibited by the provisions of the Constitution of the United States, the State says: No, this is an "excise tax" for the privilege of doing this business and is not prohibited by Constitu-

tion for that reason. To this we answer that there was nothing left to the State, regard being had to previous legislation, excepting to place this tax upon the transaction of the business of the road, *which was in fact* commerce between the several States and Canada, and that having entered into a contract permitting the doing of that business it is equally a burden whether it is placed upon the privilege of exercising a franchise long since granted or upon the transaction of the same business under any other form or designation.

The language used by the Legislature is not controlling: it is the fact to which the Court must look in ascertaining whether the tax is one which falls within the constitutional prohibition, and in ascertaining that fact the Court will examine and see what the Legislature of Maine has before said as to the taxes already imposed, and what the business of the road is upon which they have imposed the burden. The Legislature of 1881 is to be presumed as knowing what conditions its predecessor had already imposed in granting the charter.

The case of the State *v.* Maine Central Railroad does not conflict with this position, because in that case both the original and leasing roads were within the limits of the State of Maine, and, secondly, because there was no question of interstate commerce raised in that case.

Now, it cannot be well said that this tax, which is imposed upon the Grand Trunk Railway, *is an excise tax for the privilege of exercising the franchises of that road within the State of Maine.* All its franchises had been granted by an alien jurisdiction. When, therefore, the Act provides that every corporation, person or association operating any railroad in this State shall pay to the State treasurer for the use of the State an annual "excise tax for the privilege of exercising *its* franchises in this State," which, with the tax provided for in Sect. 1, shall be in lieu of all taxes upon such railroad, its property and stock, the facts relating to the franchises of the defendant error would not bring it within the language used.

The franchises granted to the Grand Trunk, the defendant in error, would not extend beyond the limits of the jurisdiction of the sovereignty granting them. The defendant in error was not operating the Atlantic & St. Lawrence Railroad by authority of franchises granted to it by the Dominion of Canada, and therefore it was not

competent for the State to put a tax upon the Grand Trunk Railway of Canada, the defendant in error, for the privilege of exercising "its" franchises within the State of Maine, not for a license to do business, or the privilege of using franchises not its own; but had the Grand Trunk been possessed of franchises within the State of Maine, it would still be for the privilege of carrying on business relating to interstate commerce under such franchises.

The law does not say that the tax has been imposed upon a person or corporation operating another railroad than its own within this State for the privilege of exercising the franchises of the railroad so operated; and it is submitted that it would not have the right to impose upon an alien corporation an "*excise tax*" for the privilege of exercising the franchise of another railroad when it had no franchise of its own exercised within the State.

The language of the statute should not be extended by construction, but be held to mean what its words plainly imply. For the reasons before stated, it would not be competent to impose the tax upon the defendant in error for the exercise of the right to carry on the business of transportation of persons and property between the several States granted under the circumstances described to the Atlantic & St. Lawrence Railroad.

It should be borne in mind that by the terms of the Act of 1881 this tax is not assessed upon the defendant in error for a *license* to do business in the State of Maine as an alien corporation. Nor is it a tax upon the defendant in error for the *privilege of exercising the franchises of the Atlantic & St. Lawrence Railroad* within this State. Nor is it an excise tax imposed upon a domestic corporation, local in its nature and fixed in its amount, for the privilege by said corporation of transacting business within its limits. But it is a tax upon the Grand Trunk, the defendant in error, for the privilege of exercising *its* franchises within the State of Maine. The nature of the subject-matter of such taxation is further disclosed by providing that the several cities and towns in which railroad stock is held exempt by said Act from taxation shall receive an amount equal to one per cent on the value of such stock as determined by the Governor and Council.

It is true that the Act of 1881 calls the tax an excise tax; but this designation by the Legislature cannot control, if it is shown that the tax does not properly fall within the description contained in the Act.

Judge Cooley in distinguishing between "customs duties" and "excise duties" says that "excise duties" are inland imposts levied upon articles for manufacture and sale and upon licenses to pursue certain trades or deal in certain commodities, and upon privileges.

In Oliver *v.* Washington Mills, 11 Allen, 268, Chief Justice Bigelow distinguishes between a tax and an excise, and says, "The former is a charge apportioned either among the whole people of the State, or those residing within certain districts, municipalities or sections. It is required to be imposed, as we shall more fully explain hereafter, so that if levied for the public charges of government, it shall be shared according to the estate, real and personal, which each person may possess; or if raised to defray the cost of some local improvement of a public nature, it shall be borne by those who will receive some special and peculiar benefit or advantage which an expenditure of money for a public object may cause to those on whom the tax is assessed. An excise, on the other hand, is of a different character. It is based on no rule of apportionment or equality whatever. It is a fixed, absolute and direct charge laid on merchandise, products or commodities, without any regard to the amount of property belonging to those on whom it may fall, or to any supposed relation between money expended for a public object and a special benefit occasioned to those by whom the charge is to be paid."

Therefore it seems to me to be clear that if the burden imposed by the Act of 1881 is an excise, it must be confined to operations within the State of Maine and be local in its character. If, on the contrary, it affects franchises which are to be exercised within and without the limits of the State and relates to business to be transacted under these franchises between the several States, it cannot be properly designated by the Legislature as an excise or an excise tax within the proper definition of that phrase.

It seems to me to be clear that the Legislature of Maine would not have the power to impose an excise upon a corporation doing

business outside of the State of Maine, for the doing of such business simply because such corporation might also do business within the limits of such State. The Act of 1881 does not discriminate at all between the business done within and without the State of Maine; and it makes no difference whether it is called a tax or excise tax or by some other name. It is a burden imposed by way of taxation upon the business done, not in the State of Maine alone, but in territories beyond the limits of such State.

Judge Cooley in speaking of taxes of franchises, says: "that such taxes were often measured by a standard which suggests the question whether in fact they are not taxes on property, in which case they might not perhaps be admissible."

In this case it must be evident that the Legislature intended to tax the corporation for exercising its entire franchises, and that there was no separation of the privilege whether within or without the State, because the burden which is imposed upon the corporation is measured, not by its earnings within the State of Maine, but by its earnings within and without the State. What the tax really was was a question of fact to be determined under the testimony before the Court below. It was a question of law which depended upon the Court's finding the facts to be that the tax was a regulation of interstate and foreign commerce. Nor do the rulings of the Court below state upon what ground it was based, except that it was such regulation of foreign commerce, and this was based upon the facts found by the Court under the agreement and stipulation of the parties. Nor is it an attempt on the part of the Court below to pass upon the validity of the law of 1881 as such. But the Court makes a full statement of the facts found by him and rules "that the imposition of the taxes in question in this cause was a regulation of interstate and foreign commerce," and he further rules that it was "in conflict with the exclusive powers of Congress under the Constitution of the United States, and is invalid." This last was certainly a question of law; but in order to rule that the imposition of the taxes in question was in conflict with the exclusive powers of Congress under the Constitution of the United States, the Court must have found that notwithstanding the language of the statute, the facts in this case which were brought to his attention and which he was author-

ized to find made the taxes in the case before him a regulation of interstate and foreign commerce. (See Record, page 13.)

In other words the Court below does not attempt to decide the naked question as to whether in some cases the State might not have a right to impose an excise tax for the privilege of exercising the franchises of a corporation within its borders. But he does rule that the facts which he finds *in this case* make the imposition of the tax in question a regulation of interstate and foreign commerce, and as such invalid; and if my previous reasoning has been correct, there seems to me to be no just escape from this conclusion as a matter of fact in this case.

I beg the Court to carefully examine this position, and unless the record shows a state of facts which negatives the conclusion of Judge Webb, that we may have the benefit of his finding and that the tax in the present case may be declared unconstitutional, even though the Court sustain the validity of the act itself as applied to other cases.

In the case of the Home Insurance Company *v.* New York, 134 U. S. 594, it will be observed that the act of Legislature provided that every corporation, joint stock company or association doing business in the State should be subject to a tax upon corporate franchises or business to be computed in the manner therein prescribed. And under the facts of that case the Court held that the tax was not upon the capital stock of the company nor upon any bonds of the United States composing a part of that stock, but upon the corporate franchise or business of the company, and that reference was only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year, and that the validity of the tax was in no way dependent upon the way in which the State saw fit to adopt in fixing the amount for any year which it would exact for the franchise, and that no constitutional objection lay in the way of a legislative body prescribing any mode of measurement to determine the amount it will charge for the privilege it bestows.

Now, in that case, there is no question in relation to the nature of the business transacted by the company; it was a domestic corporation and its business was of a domestic character, and the manner

of ascertaining the amount of tax was in no particular descriptive of that business, so far as to determine whether it was business done wholly within the State or between several States; but in this case the manner in which the tax is determined and assessed is descriptive of the nature of the business to be performed and of the character of the franchises for the exercise of which the tax was to be imposed. I certainly do not contend that where the prohibition of the Constitution which obtains in cases where the State undertakes to regulate interstate commerce, does not prevent, it would not be constitutionally competent for the State to determine the amount of tax imposed by the method pointed out in the case of the Home Insurance Company against New York, but I respectfully submit that the constitutionality of obtaining the result was not in question here; it was that evidence taken together with other facts in the case that authorized the finding of Judge Webb that the commerce which the State of Maine undertook to regulate by this Act, and upon which it imposed its burden, was interstate commerce and not commerce confined to the State imposing the tax. My contention in this case is that the facts spread upon the record aided by the language of the statute itself as to the manner of imposing the tax, conclusively shows that the tax imposed was a burden upon the business of the corporation, and that business was commerce between States and with a foreign country. And I further contend that the finding and ruling of the Court below, sustains this conclusion. The nature of the business effected by a tax is to be gathered from the circumstances under which such business is done, and which may vary in different cases; and the manner of assessment and mode of collection may constitute, in part, the facts from which the Court may find what the character of the tax imposed really is.

Providence Institution *v.* Massachusetts, 6 Wall. 611,631.

If the case is reargued I shall claim that even if the finding of Judge Webb of the Court below, should be held as not conclusive, still, that it is well founded in the record for the following reasons:

*First.* Because by the Act of incorporation itself, the Atlantic & St. Lawrence Railroad was vested with power and authority to prolong its railroad beyond the limits of the State of Maine to the boun-

dary of Canada, and to purchase, take and hold lands or the right of way over lands for the purpose of constructing said railroad in continuation, without the limits of the State of Maine, on and over said lands to the boundary of Canada, provided the same could be done consistently with the laws or regulations of the State or States through such railroad would pass, and that the necessary authority for such continuation was obtained from the States of New Hampshire and Vermont, and the railroad was empowered to complete its road as contemplated by the original charter, such a road when completed would be an interstate road, and not confined to the limits of the State of Maine.

*Second.* That by the Act of incorporation, the Atlantic & St. Lawrence Railroad was empowered to do business as a railroad for the transportation of persons and merchandise over the road so constructed and between the several States and Canada.

*Third.* Because, afterward, the defendant in error, the Grand Trunk Railway Company of Canada, united by lease this road in a continuous line from the city of Portland through Canada to the State of Michigan.

*Fourth.* That the business transacted over the Atlantic & St. Lawrence Railroad of which return was made to the State as required by the Act were the gross transportation receipts for merchandise carried over the entire road, amounting in the year 1880 to $956,202.45, and for 1881 amounting to $1,018,667.33.

*Fifth.* Because it further appears that the business of such road was also business between the several States through which the Atlantic & St. Lawrence passed and the Dominion of Canada.

*Sixth.* Because from the very nature of the business shown to have been carried on by means of this railroad it must have been commerce between the several States through which it passed and commerce between these States and the Dominion of Canada.

*Seventh.* Because no other business than such as above described is shown to have been transacted by the Atlantic & St. Lawrence Railroad under its franchises.

*Eighth.* Because the Legislature of Maine, having determined the burden imposed upon the Atlantic & St. Lawrence Railroad, left

nothing to be taxed except the transaction of this business between the several States and between the United States and Canada.

*Ninth.* Because an examination of the Act of 1881 shows that the method of determining the amount of the tax to be imposed is descriptive of the nature of the business done and that such business was commerce between the several States and a foreign country.

I also believe that the decisions of this Court authorize me to argue hereafter that the business disclosed by this record is interstate commerce and that the tax imposed in the present case is a burden placed by the State upon the transaction of such business and therefore a regulation of it. I am aware how familiar the Court must be with the language of these cases and I do not at this time intend to discuss them at length, but it seems to me to be beyond question that if I am right in my claim as to the nature of the business transacted and that the tax was a burden upon it then these cases must apply.

I could not have been misled when I found, as in the case of Philadelphia Steamship Company *v.* Pennsylvania, 122 U. S. 326, this language: "It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the Act it was laid equally on the corporations of other States doing business in Pennsylvania. *If intended as a tax on the franchise of doing business,— which in this case is the business of transportation in carrying on interstate and foreign commerce,— it would clearly be unconstitutional.*" In that opinion all the Judges concurred. It has never been overruled. If in that case it was true that the tax on the franchise of doing business, "which was the business of transportation in carrying on interstate and foreign commerce, would be clearly unconstitutional," why would it not be as clearly unconstitutional in the present case, where the business carried on is certainly the business of transportation in carrying on such interstate and foreign commerce?

I find, furthermore, that in the case just cited the defendant in error was a corporation engaged in the business of transportation of persons and freight between the ports of Philadelphia and Savannah and in foreign trade from New Orleans, and was duly chartered with

franchises for this purpose. In discussing the question of whether it was a franchise the Court used the language above quoted. And in the case of Gloucester Ferry Company *v.* Pennsylvania, 114 U. S. 196, the plaintiff in error was acorporationincorporated by the Legislature of New Jersey to establish a steamboat terry from the town of Gloucester in that State to the city of Philadelphia in Pennsylvania, and its entire business consisted of ferrying persons and freight across the river between these two places. The company was taxed under a Statute of Pennsylvania, passed June 7, 1879, which provided a tax computed in a certain manner upon the valuation of the capital stock of the company.

The Court of Common Pleas gave judgment in favor of the company; the Supreme Court of the State gave judgment in favor of the State, and the Ferry Company carried the case to the Supreme Court. Mr. Justice Field delivered the opinion of the Court in which he defined with great clearness what would constitute commerce among the States, and says: —

"It matters not that the transportation is made in ferry-boats, which pass between the States every hour of the day. The means of transportation of persons and freight between the States does not change the character of the business as one of commerce, nor does the time within which the distance between the States may be traversed. Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted; to determine when it shall be free and when subject to duties or other exactions."

The Court holds that the nature of the business, being commerce between the States, that the tax upon it was unconstitutional. The Court says in the case above cited that a tax on the franchise of doing business, which is the business of transportation and carrying on interstate commerce and foreign commerce, would be clearly unconstitutional.

In my former brief in this case I have cited many cases which show that if the franchises of the railroad taxed were the franchises of doing business of transportation between the several States the tax would be unconstitutional, and that if the business was actually commerce between the states (as in this case there is no doubt that it was) then the imposition of any burden upon it would be unconstitutional.

In the two cases of Pickard *v.* Pullman Southern Car Company, 117 U. S. 34, and in Tennessee *v.* Same, same report, page 51, the opinion was delivered by Mr. Justice Blatchford, and there is no dissent therefrom. That was a privilege tax for doing the business of running sleeping cars for the transportation of passengers carried into and across the State of Tennessee, and leased to a Tennessee railroad. After a review of all the authorities the Court held that such a tax was unconstitutional, as being a restriction upon interstate commerce.

I cannot see why the law of that case is not applicable in the present; and the reasons for the decision are therein fully set forth.

For these reasons I ask for a rehearing and reargument of this case.

As appears from the report of the case found in the forthcoming volume (No. 142 of the Supreme Court, page 217), both counsel assume in the argument that this tax was imposed upon the business of the transportation of freight and passengers between different States and a foreign country.

The suggestions which I now submit to the Court in view of the decided cases did not seem necessary to be urged.

With the intimate personal knowledge which I had of the subject-matter of the nature of the business of the defendant in error, I did not for a moment consider that the Court would not determine the business carried on was interstate commerce, or that the tax was either a direct tax upon the earnings of the corporation under the term of "excise tax"; or if it was upon the franchises of the corporation, that it was equally franchises for the transaction of business between the several States. Hence, the question and others have not been discussed or called to the attention of the Court.

In the brief time which I have had for the preparation of these

additional reasons, I have not been able to present them in the form of an argument; nor did I deem it necessary, since I felt sure that if my contention is correct the Court would grant a rehearing at which both parties could be heard to present their views, more in order. I cannot but believe that such will be the decision of the Court, and I rest in the expectation that the real facts of this case and the nature of the tax imposed will insure the decision of the Court favorable to the defendant in error.

A. A. STROUT,

*Attorney for petitioner for a rehearing.*

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 302.

## STATE OF MAINE,

PLAINTIFF IN ERROR,

*v.*

## GRAND TRUNK RAILWAY COMPANY OF CANADA,

DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT IN ERROR,

AND

## ADDITIONAL BRIEF IN REPLY TO THE ARGUMENT OF THE PLAINTIFF IN ERROR.

# UNITED STATES SUPREME COURT.

STATE OF MAINE, PLAINTIFF IN ERROR,

*vs.*

GRAND TRUNK RAILWAY COMPANY OF CANADA, DEFENDANT IN ERROR.

## BRIEF OF DEFENDANT IN ERROR,

AND

## ADDITIONAL BRIEF IN REPLY TO THE ARGUMENT OF THE PLAINTIFF IN ERROR.

This is a writ of error from the Circuit Court for the District of Maine. The suit is an action of debt brought to recover certain taxes for the years 1881 and 1882, assessed upon the defendant corporation by the Governor and Council of the State of Maine, under the authority of the provisions of Chapter 91 of the Laws of the State of Maine of 1881, and embodied in the Revised Statutes of said State, Chap. 6, Sect. 41, *et seq.*

The court found that the defendant in error was and is a foreign corporation, incorporated under the laws of the Province of Canada, and that its principal place of business was at Montreal, in the Dominion of Canada.

That from the year 1853 until the present it possessed and operated a line of railroad, extending from Montreal to Island Pond in the State of Vermont, and from Montreal through the Dominion of Canada to Detroit in the State of Michigan.

That in 1855, requisite legislative authority having previously been procured therefor, the defendant in error took a lease for nine hundred and ninety-nine years of the Atlantic & St. Lawrence Railroad, extending from said Island Pond, in the State of Vermont, through the States of Vermont, New Hampshire and Maine, to the city of Portland, in said State of Maine. And from that time has

managed, controlled and operated the leased railroad, with all its appurtenances, as a part of their said line of railroad from Portland, Me., to Detroit, Mich.

That, in 1874, the defendant in error acquired the Lewiston & Auburn Railroad, extending from the point of junction with the defendant's railroad to the city of Lewiston, a distance of five and one half miles, and that subsequent to 1872 the defendant leased the railroad extending from Norway to South Paris, a distance of one and one half miles, and that all these roads have been controlled and operated by the defendant in error as one line, for the purpose of transportation of passengers and freight.

The court further found that the Atlantic & St. Lawrence Railroad was built from Portland, Me., to Island Pond, Vt., under the authority of an act of the Legislature of Maine, approved Feb. 10, 1845, and by authority of legislative enactments of the States of New Hampshire and Vermont, by which it was duly constituted a corporation within said States. The Atlantic & St. Lawrence Railroad so constructed was eighty-two and one half miles in the State of Maine, fifty-two miles in New Hampshire, and fifteen miles in the State of Vermont. That by its act of incorporation it was vested with the power and authority to "continue and prolong its railroad beyond the line to the State of Maine and the boundary of Canada, with authority to purchase, take and hold lands, or the right of way over lands, for the purpose of constructing said railroad, provided that this act be done consistently with the laws or regulations of the State or States over which said railroad would pass in its continuation." The necessary authority for such continuation was obtained from the States of New Hampshire and Vermont.

That by the authority granted by the Legislature of Maine to lease the Atlantic & St. Lawrence Railroad it was enabled "to make such lease, or contract in the nature of a lease, as would enable the lessee thereof to maintain and operate by means of said railroad, and other roads in extension of the same, a connecting line of railroads from the Atlantic Ocean in Portland, Me., to the city of Montreal, in the Province of Canada, and thence to the westerly part of said Province." The lease made by virtue of this authority

was confirmed and approved by the Legislatures of New Hampshire and Vermont.

The original charter granted by the State of Maine contained the following section: —

"SECT. 16. All real estate purchased by said corporation for the use of the same under the fifth section of this act shall be taxable to said corporation by the several towns, cities and plantations in which said lands lie, in the same manner as lands owned by private persons, and shall in the valuation list be estimated the same as other real estate of the same quality in such town, city or plantation, and not otherwise; and the shares owned by the respective stockholders shall be deemed personal estate and be taxable as such to the owners thereof in the places where they reside and have their home. And whenever the net income of said corporation shall have amounted to ten per centum per annum upon the cost of the road and its appendages and incidental expenses, the directors shall make a special report of the fact to the Legislature; from and after which time one moiety, or such other portion as the Legislature may from time to time determine, of the net income from said railroad accruing thereafter over and above ten per centum per annum first to be paid to the stockholders, shall annually be paid over by the treasurer of said corporation, as a tax, into the treasury of the State, for the use of the State. And the State may have and maintain an action against said corporation therefor to recover the same. *But no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises.*"

By Section 18 of the charter, the Legislature was given the right to inquire into the doings of the corporation, and its use and employment of the privileges and franchises granted to it, and with the right also "to correct and prevent abuses of the same, and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities and duties hereinbefore set forth and enjoined, but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered,

limited or restrained without the consent of the corporation, except by due process of law."

By Chapter 91 of the Laws of Maine passed in 1881, and embodied in the Revised Statutes of 1883, Chap. 6, Sects. 41, *et. seq.*, it is provided as follows: —

"SECT. 2. Every corporation, person or association operating any railroad in the State shall pay to the treasurer of State, for the State, an annual excise tax for the privilege of exercising its franchises in the State, which, with the tax provided for in Sect. 4, is in place of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the State from the taxes received under this and the six following sections to the several cities and towns in which, on the first day of April in each year, is held railroad stock exempted from other taxation, an amount equal to one per cent on the value of such stock on that day, as determined by the governor and council, *provided*, *however*, that the total amount thus apportioned on account of any railroad shall not exceed the sum received by the State as tax on account of such railroad.

"SECT. 3. The amount of such annual excise tax shall be ascertained as follows: The amount of the gross transportation receipts, as returned to the railroad commissioners for the year ending on the thirtieth day of September preceding the levying of such tax, shall be divided by the number of miles of railroad operated, to ascertain the average gross receipts per mile; when such average receipts per mile do not exceed two thousand two hundred and fifty dollars the tax shall be equal to one quarter of one per cent of the gross transportation receipts; when the average receipts per mile exceed two thousand two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one half of one per cent of the gross receipts; and so on, increasing the rate of the tax one quarter of one per cent for each additional seven hundred and fifty dollars of average gross receipts per mile, or fractional part thereof: *provided*, that the rate shall in no event exceed three and a quarter per cent. When a railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax shall be equal to the same proportion of the gross

receipts in the State, as herein provided, and its amount shall be determined as follows: The gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the State, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the State."

By Sect. 7 of the Act of 1881, if the returns required by law are found insufficient to furnish the basis upon which the tax is to be levied, the railroad commissioners shall require such additional facts in the returns as may be found necessary. It is further provided that the railroad commissioners shall have access to the books of the railroad company, to ascertain if the required returns are correctly made; and any railroad corporation, association or person operating any railroad in the State, which refuses or neglects to make the returns required by law, or to exhibit to the railroad commissioners its books for the purposes aforesaid, or makes returns which the president, clerk, treasurer, or other person certifying to such returns knows to be false, forfeits not less than one thousand, nor more than ten thousand dollars, to be recovered by indictment, or by an action of debt in any county into which the railroad operated extends.

Under and by virtue of this law the tax in question was levied. The returns required by law furnished by the Atlantic & St. Lawrence Railroad Company showed the transportation receipts of the Atlantic & St. Lawrence Railroad Company, over its entire line within the States of Maine, New Hampshire and Vermont to be, for the year ending June 30, 1880, $956,202.45, and for the year ending June 30, 1881, $1,018,667.33. Upon these gross receipts for transportation, the governor and council assessed for the year 1881 the sum of $9,569.66, and for the year 1882, the sum of $12,095.56. And this tax was laid, as alleged in said act for the privilege of exercising the franchises of said railroad in the State of Maine.

The writ alleges that the defendant "was and had been operating a railroad in the State, the same lying 'partly within and partly

without this State,' and thereby became liable by law to pay to the State treasurer, for the use of said State, an annual excise tax for the privilege of exercising its franchises in the State of Maine, one half of said tax to be paid to said State of Maine on the first day of July, and the other half on the first day of October, next following the levy of the same." (Record, p. 3.)

These taxes were ascertained by dividing the gross transportation receipts of the entire line of railroad within and without the State of Maine, by the number of miles operated to obtain the average gross receipts per mile. This last sum, multiplied by the number of miles operated within the State of Maine, gave the gross receipts upon which the tax was laid, and this sum was multiplied by the percentage as provided in the act above quoted.

## I.

1. Cases recently decided by this court establish beyond question that the act of the Legislature of Maine, and the taxes imposed thereunder, are invalid, because they are in conflict with the exclusive powers of Congress under the Constitution of the United States for the regulation of commerce with foreign nations, and among the several States.

Constitution, Art. 1, Sect. 8, Clause 3.
*McCall* v. *California*, 136, U. S. 104, and cases cited.
*Lyng* v. *State of Michigan*, 135 U. S. 161, 166.
*Pensacola Telegraph Company* v. *Western Union Telegraph Company*, 96 U. S. 1.
*Sherlock* v. *Alling*, 93 U. S. 99, 102.
*Norfolk and Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114.

2. The only business of the defendant in error is interstate and foreign commerce, and upon the privilege of carrying on this business the tax is levied.

3. It cannot be said that this is a tax upon the receipts as property in the treasury of a domestic corporation. The defendant in error

is a foreign corporation, and the case finds that its principal place of business is at Montreal. The receipts went to the home office. The statute does not base the tax upon that ground.

II.

The attempt to tax the property and franchises of Atlantic & St. Lawrence Railroad Company in the hands of the defendant in error is a violation of the contract contained in the charter under which the leased road was constructed. The franchises of the Atlantic & St. Lawrence Railroad Company are forever exempt from taxation, except in the manner provided by the charter, and the question is, whether a law which in its necessary operation, when applied to the lessee of the Atlantic & St. Lawrence Railroad, is to impair the rights and privileges of the Atlantic & St. Lawrence Railroad, and which if valid at all must be valid as a tax upon the property and franchise and chartered rights of the Atlantic & St. Lawrence Railroad, can be sustained. The State has solemnly agreed with the Atlantic & St. Lawrence Railroad that it would tax in a certain way, and further that "no other tax than herein is provided shall ever be levied or assessed upon said corporation, or any of their privileges or franchises." It further agreed that all the real estate of the corporation shall be taxable by the several towns, cities and plantations in which the lands lie, in the same manner as land owned by private persons, and shall be estimated the same as other real estate of the same quality, in such city, town or plantation, and not otherwise, and the shares owned by the respective stockholders shall be deemed personal estate, and taxable as such to the owners thereof, where they reside. But by the law of 1881, the real estate of the Atlantic & St. Lawrence Railroad Company is taxed in another manner than provided by their charter, and instead of the stock being taxed as therein provided, another and different form of taxation is substituted, arbitrary in its kind and unequal in its effect, and the taxation which is thus imposed is made *a lien on the railroad operated, which takes precedence of all other liens and incumbrances.* How can it be said that such an act does not impair the obligations and chartered

rights of the Atlantic & St. Lawrence Railroad Company? Prior to the passage of such act, no tax could be imposed except upon the real estate and stock, until the net income of the corporation should amount to ten per cent per annum.

Before the passage of the law of 1881, with the assent of the Legislature, the Atlantic & St. Lawrence Railroad Company must have issued bonds secured by mortgage, and had then leased its road property and rights, including its franchises, to the defendant corporation, receiving a valuable rental therefor, which rental was the first incumbrance and charge upon the property, and upon the defendant corporation. But by the very language of this act, all these privileges are abrogated and destroyed, and another incumbrance, novel in its nature and imposition, is substituted for the rights of the Atlantic & St. Lawrence Railroad Company, and become the first lien upon the corporation.

I assume that no question can be made that the rights conveyed by its charter, to take tolls and to enjoy other privileges conferred by the government upon the Atlantic & St. Lawrence Railroad, fall properly and legitimately within the meaning of the term "franchise," as contained in Section 16 of that act. In fact, the right to operate the railroad itself, to collect fares, to regulate rates of freight, and to enjoy other privileges which are exercised under the lease of the Grand Trunk Railway and the Atlantic & St. Lawrence Railroad, all fall within the meaning of that term.

1 *Black Com.* "*Rights*," Book II., p. 37.
*Morgan* v. *Louisiana*, 93 U. S. 217.
*Railroad Company* v. *Georgia*, 98 U. S. 359, 365.

Now the purpose declared by the Act of 1881 is to tax corporations operating any railroad in this State, *for the privilege of exercising their franchises within the State.*

It seems to be perfectly clear that this privilege was conferred by the charter of the Atlantic & St. Lawrence Railroad in the first instance, and was transferred to the Grand Trunk Railway Company, by force of its lease authorized by the Legislature of the State of Maine, and is not dependent upon any subsequent legislative grant.

When, therefore, the Legislature attempted to tax any of the franchises in the manner provided by the Act of 1881, it is not the franchises of the Grand Trunk Railway Company granted to it by the State, but the franchises of the Atlantic & St. Lawrence Railroad Company which has been transferred by the lease to the defendant corporation, that forms the basis of that tax, and we claim that the Act of 1881 is not only an impairment of the obligation of the contract entered into between the Atlantic & St. Lawrence Railroad Company and the State, but it is in direct violation of the provisions of such contract, and cannot be sustained.

The consideration of this last question may not be open in this case, and is not necessary to this decision.

A. A. STROUT,
*for Defendant in Error.*

## ADDITIONAL BRIEF IN REPLY TO THE ARGUMENT OF THE PLAINTIFF IN ERROR.

The questions involved in the present contention have been so frequently and thoroughly discussed, that further argument as to the principle involved, seems unnecessary. These questions are confined in the present case to the following inquiries: —

1. Was the business of the defendant in error commerce between the States or with a foreign country?

2. Is this tax placed upon it "for the privilege of exercising its franchises within the State," a burden upon, or otherwise a regulation of such commerce?

The rule to be applied depends upon the facts presented by the record. Repeated and well-considered cases have left no doubt as to what the law is. If the record presents a case where the business in relation to which the tax is levied is interstate or foreign commerce, and the tax placed upon it, by the burden it imposes, or otherwise, operates as a regulation of such commerce, then the law which authorizes such tax is unconstitutional and void, however ingenious the phraseology which it employs in its illegal usurpation of powers conferred by the Constitution exclusively upon Congress.

In *Lyng* v. *Michigan*, 135 U. S., 166, the Court said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

In this case there is no question of police regulation and no necessity to invoke the maxim of "*Salus populi suprema lex.*"

*Fargo* v. *Michigan*, 121 U. S. 230.

*Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S. 326.

*McCall* v. *California*, 136 U. S. 104.
*County of Mobile* v. *Kimball*, 102 U. S. 691, 702.
*Pickard* v. *Pullman Southern Car Co.*, 117 U. S. 34.

The counsel for the plaintiff in error relies upon the case of *State Tax on Railway Gross Receipts*, 15 Wall, 284, to sustain the validity of the law by virtue of which the taxes under consideration were imposed. It is unnecessary to spend time in replying to his elaborate argument in which he attempts to show that the case has not been overruled. This record presents no state of facts such as would bring it within the scope and authority of that decision, even if it was unquestioned law; but whether it has been entirely overruled or not, it has been so questioned that it is no longer a conclusive authority, even in a similar case, and to-day would not, in its present form, find its way into the reports of this Court.

*In Philadelphia Steamship Company* v. *Pennsylvania*, 122 U. S., 326, Mr. Justice Bradley, pronounced the opinion of the court, to which there was no dissent. The court says (p. 341): "The tax in the present case is laid upon the gross receipts for transportation as such." . . . "A review of the question convinces us that the first ground on which the decision in *State Tax on Railway Gross Receipts* was placed is not tenable; that it is not supported by anything decided in *Brown* v. *Maryland*; but, on the contrary, that the reasoning in that case is decidedly against it. The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the state. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the act, it was laid equally upon the corporations of other states doing business in Pennsylvania. If intended as a tax on the franchise of doing business, — which in this case is the business of transportation *in carrying on interstate and foreign commerce, — it would clearly be unconstitutional.*"

The same opinion in relation to this case is substantially stated in the case of *Fargo* v. *Michigan*, 121 U. S., 230, 243, and in every case which has followed where the court has been called upon to express

any opinion touching the subject matter embraced in that case, and I respectfully submit that it has long since ceased to be an authority so far as the vital points of the present controversy are concerned.

The facts in the case at bar were found, by agreement, by the court below without the intervention of a jury. To state the case in accordance with those facts is to demonstrate that the tax in this case, and the law under which it was imposed, were both in conflict with the provisions of the Constitution which confers upon Congress the exclusive regulation of interstate and foreign commerce.

In the first place it is unquestioned that this is a tax assessed by the State of Maine against the *Grand Trunk Railway Company of Canada*, the franchises of which were conferred by a charter granted by a foreign legislature, and is not a tax against the Atlantic & St. Lawrence Railroad Company, which possessed certain franchises conferred by the legislative authority of the State of Maine.

If the defendant in error had been a corporation created by the Legislature of the State of Maine, and exercising its franchises within the territorial limit of that State, and not beyond it; if it had possessed its franchises by virtue of grants made by the Legislature of the State of Maine; if it had had its offices and treasury within the limits of the State, and if the law had imposed a tax upon its franchises and property, *as property*, and there had been no contract in the charter prohibiting such taxation, then it would present a very different question from that raised by the facts in this record.

But no one of these conditions is true so far as the defendant in error is concerned. It is in no sense a domestic corporation of the State of Maine, but a foreign corporation, obtaining and exercising its franchises by virtue of another sovereignty and only licensed and permitted to hold its lease and to do the business for which it was created by a foreign country. It was engaged throughout its entire length in commerce between the States and with the Dominion of Canada. It had no office in the State of Maine; but the case finds affirmatively that it "*has its principal place of business at Montreal in the Dominion of Canada.*" (Record, page 10). And

the tax in question was in no sense a tax upon the franchises of the Grand Trunk Railway Company as property, nor upon any other of its taxable estate, but was solely by the express terms of the act authorizing its imposition, a tax for the privilege of exercising its franchises; or in other words, of carrying on its business within the State of Maine.

The contention of the counsel for the plaintiff in error is that "the tax at bar can be sustained upon the ground that it is a tax *upon the value* of the prerogative franchise which is enjoyed, operated and its value ascertained by the Grand Trunk Railway Company, by virtue of the express permission of the State of Maine." (Brief for the State of Maine, page 33), and he further insists that this "value" is very great. To this argument there are two conclusive answers. The Statute under which the tax is laid only authorizes the imposition of "an annual excise tax for the *privilege of exercising its franchises in the State*, which with the tax provided for in Sect. 1, *is in place of all taxes upon such railroad, its property and stock.*" Here the distinction between a "privilege" tax and a "property" tax is clearly defined by the statute itself because it declares that the tax to be imposed for the privilege of exercising the franchises of a railroad corporation within the State should be *in place* of all taxes upon such *railroad, its property and stock*, and in Sect. 1 of the Act, provision was made for the taxation of land and fixtures outside the location of the railroad the same as other land and fixtures. (Appendix, Sect. 2, Act of 1881.) Moreover, whether the tax was assessed upon the value of the franchises of the owner as used by defendant in error in carrying on its business of the transportation of freight and passengers between the several States through which it passed, to and from Canada, or upon the privilege was a question of fact, and was so found by the presiding judge. In his findings of fact (Record, page 12), the court below found that "on the first day of April, A. D. 1881, the Governor and Council, at a regular executive session and within the time prescribed by the statute, proceeded to ascertain the amount of excise taxes for the year 1881 which corporations operating railroads in this State, should, under the provisions of the statute, pay to the State Treasurer

for the use of the State, *for the privilege of exercising their respective franchises in the State*, and determined the amount of such tax to be paid by the defendant Railroad Company operating the Atlantic and St. Lawrence Railroad, the Lewiston and Auburn Railroad, and the Norway Branch Railroad for the same, etc."

I cannot see how the court can pass upon any case except that presented by the record. Very much is argued in this connection as to the distinction between "prerogative" and "common" franchises. The statute under consideration makes no such distinction. It does not tax for the privilege of using "prerogative franchises" or "common franchises," but for the privilege of using *the franchises* of such railroad. The counsel for the plaintiff in error stretches his definition of prerogative franchises to cover too much ground. It may be that the right to take and condemn land, to cross highways and tide-waters, and to do such acts as would interfere with the vested common law rights of property or with public property, might be termed, for the sake of distinction, "prerogative" franchises; but if a railroad corporation has any common franchises they consist of the right to run its trains over its road, collect toll for freight and passengers, regulate the conduct of its employes and of the public whilst travelling over its road, and, in general, the transaction of its business as a common carrier of persons and property; and in the present case the exercise of these franchises and the transaction of this business constituted the commerce carried on by this great line of railroad between the several States and with Canada.

The defendant in error was taxed for the use and exercise of all of its franchises whether they were common or uncommon, whether the were conferred by the Legislature of Canada or by the lease authorized by the Legislature of Maine of the railroad extending through Maine, New Hampshire and Vermont, and if this was not a regulation of that business and of interstate commerce, what would be such regulation?

In determining the nature of the business which is performed by the defendant in error, it will be useful to call the attention of the court to the geographical limits covered by it and its branches. The case finds that the Grand Trunk Railway Company of Canada was incorporated

under the laws of the Province of Canada prior to the year 1853 and possessed from that year to the present a railroad connecting with, and in extension of the railroad of the Atlantic & St. Lawrence Railroad Company at Island Pond, in the State of Vermont, and extending to Montreal. It also, at and before the date of the assessment of taxes demanded in this suit, possessed a line of railroad connecting with the before-mentioned railroad at Montreal and extending through the Dominion of Canada to Detroit, in the State of Michigan; or rather its western terminus was at the river which separates Detroit from Canada. (Record, page 10).

The Atlantic & St. Lawrence Railroad Company was incorporated in 1845, "with power to construct and maintain a railroad from some point in the city of Portland to the boundary line of the State of Maine, at such place as will best connect with a railroad to be constructed from said boundary to Montreal, in Canada." (Record, page 9.)

The case further finds that among other franchises granted to the Atlantic & St. Lawrence Railroad was one that reads as follows: "Said corporation is vested with power and authority to continue and prolong said railroad beyond the line of this State to the boundary of Canada, and to purchase, take and hold lands or the right of way over lands for the purpose of constructing said railroad in continuation, without the limits of this State, and over said lands to the said boundary of Canada; provided the same can be done consistently with the laws and regulations of the State or States in which said lands lie, and through and over the territory through which said railroad in continuation would pass." (Record, page 9.)

And the case finds that the necessary authority for such continuation of the railroad was obtained from the States of New Hampshire and Vermont, and the road was constructed from Portland to Island Pond, in the State of Maine, eighty-two and a half miles; in New Hampshire, fifty-two miles, and in Vermont, fifteen miles.

In the record (page 11, at the bottom of the page), it is further found as matter of fact that "The Atlantic & St. Lawrence Railroad Company was duly constituted a corporation in New Hampshire and Vermont by the Legislatures of those States, and its lease to the Grand

Trunk Company was by the same authority confirmed and approved."

The corporation was therefore not only constituted by the laws of the State of Maine, but by the laws of States of New Hampshire and Vermont, and was, in some sense, a corporation in each of those States, although it was under one management.

It will be seen that in the very inception of the enterprise this Atlantic & St. Lawrence Railroad Company was not only intended to be a highway devoted to interstate commerce, but the possibility was contemplated that it should ultimately become a railroad extending through Canada to the seaboard, in the State of Maine. This purpose was ultimately accomplished.

The franchises which the company possessed were not confined alone to those which were granted by the State of Maine. The charter obtained in Maine could not confer privileges beyond the territorial limits of the State, but such privileges were conferred by the States of New Hampshire and Vermont. Nor could the State of Maine make valid a lease to the Grand Trunk Railway Company of franchises conferred by Legislatures other than its own; and the Grand Trunk Railway Company does not, — as the counsel for the plaintiff in error erroneously supposes, — hold the franchises of the Atlantic & St. Lawrence Railroad Company extending through these several States, by the authorization of the Legislature of Maine alone, but, as the case finds, it holds them by the authority and approval of each State through which the road passes. This fact will be seen to have some importance in considering whether the tax in question was a property tax upon the franchises conferred by the Legislature of Maine upon the Atlantic & St. Lawrence Railroad, inasmuch as it was a tax upon the franchises granted by the States of Vermont and New Hampshire as well as by the State of Maine.

In the case of *Steamship Company* v. *Pennsylvania*, 122 U. S., 326, the Court says (p. 342): "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. *It certainly could not have been intended as a tax on the corporate franchise, because, by the*

*terms of the act, it was laid equally on the corporations of other states doing business in Pennsylvania.*"

But in the present case nothing can add to the force of the declaration of the statute itself, that it is an excise tax for the privilege of exercising the franchises of the railroad in the State of Maine. Under these chartered rights the road was constructed and equipped, and the franchises which the counsel denominates as "prerogative" were in a measure exhausted.

The case shows that the charter granted by the State of Maine to the Atlantic & St. Lawrence Railroad Company, by Sect. 16 of the act, provided for a special method of taxation of real estate and personal property different from that contemplated by the act of 1881, and then establishes the following agreement: —

"But no other tax than herein is provided shall ever be levied or assessed on said corporation or any of their privileges or franchises."

Sect. 18 further provides that the Legislature shall have power "to correct and prevent abuses of the same (privileges and franchises), and to pass any laws imposing fines and penalties upon said corporation which may be necessary more effectually to compel a compliance with the provisions, liabilities, and duties hereinbefore set forth and enjoined, *but not to impose any other or further duties, liabilities, or obligations; and this charter shall not be revoked, annulled, altered, limited, or restrained without the consent of the corporation, except by due process of law.*"

In spite of this agreement solemnly entered into by the Legislature of Maine, if the contention of the counsel for the plaintiff in error is true, that is intended to be a tax upon the franchises of the corporation, this tax is imposed.

In 1853 the Legislature of Maine authorized the Atlantic & St. Lawrence Railroad Company to "enter into and execute such a lease, of the railroad of said company, or contract in the nature of a lease, as will enable the lessee thereof to maintain and operate, by means of said railroad and other roads in extension of the same, a connected line of railroads from the Atlantic Ocean at Portland to the city of Montreal, in the Province of Canada, and thence to the western part of said province." And the case finds that this authority was affirmed

and approved by the other States through which the railroad passed. (Record, pages 10, 11.)

And the case further finds that, since said lease and possession of the defendant in error, it has "ever since possessed, managed, controlled, and operated the railroad leased, with all its appurtenances, as a part of their line, from Portland through the State of Maine, New Hampshire and Vermont, and the Dominion of Canada to Detroit, in the State of Michigan." (Record, page 11.)

It is also to be borne in mind that there is a provision in this lease as to the payment of taxes, but that provision was not that the lessee should pay any and all taxes which might be assessed upon the property, but only those that "may lawfully be assessed upon the corporate property or franchises of the lessor during the period of their lease." And it is submitted with confidence that the defendant in error is in no wise estopped from contesting this tax by anything contained in the lease from the Atlantic & St. Lawrence Railroad Company, inasmuch as the question is open whether or not the taxes assessed were lawfully assessed. If they were lawfully assessed, the lessee is obliged to pay them; if they are not lawfully assessed, then no party is obliged to pay them.

Subsequently, the defendant in error had two other branches of railroad within the State of Maine, namely, the Lewiston & Auburn Railroad Company, connecting the Grand Trunk with the city of Auburn, a distance of six miles, and the Norway Branch Railroad Company, connecting the Grand Trunk with the village of Norway, a distance of a mile and one-half; but both of these roads became a part of the main line and were used as a means of transportation for persons and property between the different States and Canada.

Can there be any question that the business to be transacted over the railroad thus situated and constructed with the intention to make it a through line of transportation between the States of Maine, New Hampshire and Vermont, and to and with the Dominion of Canada, is other than interstate and foreign commerce? Or that, when the State of Maine undertakes to impose a tax for the privilege of exercising the franchise of the defendant in error, howsoever acquired, of

the carrying on of such business, it is in violation of the exclusive privileges of Congress conferred by the Constitution?

The unconstitutionality of the act and of the tax in question is not aided, because some part of it might under some circumstances have been constitutional, as, for instance, the tax upon the Lewiston & Auburn Railroad and upon the Norway branch, if the tax had been laid upon these lines.

In *Fargo v. Michigan*, the Court says: "The State may tax its internal commerce, but if an act to tax interstate or foreign commerce is unconstitutional, it is not cured by including in its provisions subjects within the domain of the State." In this case, however, the Lewiston & Auburn branch and the Norway branch were a part of the main line and cannot be separated from it.

Coming now to the Act of the Legislature of Maine (which will be found in the appendix to this brief), I submit that it is clearly unconstitutional and void. The act provides that "Every corporation, person or association, operating a railroad in the State, shall pay to the treasurer of the State, for the State, an annual excise tax *for the privilege of exercising its franchises in the State*." How is that tax to be ascertained? By Sect. 3 of the act it is provided that "When the railroad lies partly within and partly without the State, or is operated as a part of a line or system extending beyond the State, the tax *shall be equal to the same proportion of the gross receipts in the State, as herein provided*, and its amount shall be determined as follows: The *gross transportation receipts of such railroad, line or system*, as the case may be, *over its whole extent, within and without the State*, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in the State shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within the State.

The statute then provides that "when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars, and do not exceed three

thousand dollars, the tax shall be equal to one half of one per centum of the gross receipts; and so on increasing the rate of the tax one quarter of per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, provided, that the rate in no event shall exceed three and one quarter per centum."

But in addition to this there is another burden and restraint placed by the act upon interstate and foreign commerce transacted over this road. Section 7 of the statute makes it the duty of the railroad commissioners to require in certain cases "such additional facts in the returns as may be found necessary;" and that "the railroad commissioners shall have access to the books of railroad companies, to ascertain if the required returns are correctly made; and any railroad corporation, association or person operating any railroad in the State of Maine, which shall refuse or neglect to make the returns required by law, or to exhibit to the railroad commissioners their books for the purposes aforesaid, or shall make returns which the president, clerk, treasurer, or other person certifying to such returns known to be false, *shall forfeit a sum not less than one thousand dollars, nor more than ten thousand dollars, to be recovered by indictment, or by an action of debt in any county into which the railroad operated may extend.*" (Appendix A, Sect. 7 of Act.)

If this is not a regulation of interstate commerce in the present case, it is very difficult to perceive what would be. The railroad, by the terms of the act, is required to make returns of the gross receipts over its entire system. Moreover, it is required to exhibit its books for the purpose of enabling the governor and council to impose this tax, and the officials of the road are made liable to criminal indictment and punishment if, having knowledge, they do not correctly comply with the requirements of the act.

The necessities of the case compel the counsel for the plaintiff in error to base another argument upon an alleged condition of fact not found in the record. He contends substantially that this tax may be sustained as a tax on gross receipts in the possession of the defendant in error in the State of Maine, and says: "The defendant was certainly a tenant in possession in Maine, and as one end of the

route was in Maine, as such must have been in possession of more than the gross receipts upon which this tax was assessed."

The plaintiff's counsel is in error in this contention, for three reasons: first, the statute does not profess to tax the gross receipts, as such, as property in the State of Maine; but uses the method pointed out in Sect. 3 of the statute in ascertaining the amount of a tax to be imposed as "an annual excise tax for the privilege of exercising its franchise in the State;" second, the argument is entirely inconsistent with the idea that the tax was imposed upon the franchises as property, as argued in another part of the plaintiff's brief; and thirdly, there is not one word in the record to show that the defendant in error transacted its business as a corporation in any other jurisdiction than that where it had its domicile.

All that appears in relation to the place of business of the defendant in error is, that it is a foreign corporation, and that its principal place of business was in Montreal. The tax was imposed annually. The line of railroad operated by the defendant in error, extended from Portland to Detroit, entirely through the Province of Canada. The presumption and the fact is, that its treasury was at its principal place of business at Montreal.

It is not true that there is any foundation laid by the findings of the court for any presumption that there was any gross receipts which had become a part of general property within the State of Maine, even if the tax had been laid upon gross receipts; and it is this fact that the defendant in error is a foreign corporation, and that it has its place of business without the jurisdiction of the State of Maine, that is one of the distinguishing features of this case from the cases found in the reports where the tax has been sustained.

This court has repeatedly and recently affirmed the doctrine that the court will consider the subject matter of the tax, and determine whether or not it is a tax upon business transacted between the several States, or with a foreign country.

In the case of Fargo *v.* Michigan, 121, U. S. 243, Justice Miller, in delivering the opinion of the court, said: "The proposition that the States can, by way of a tax upon business transacted within their limits, or upon the franchises of corporations which they have,

chartered, regulate such business or the affairs of such corporations has often been set up as a defence to the allegation that the taxation was such an interference with commerce as violated the constitutional provision now under consideration. But where the business so taxed is commerce itself, and is commerce among the States or with foreign nations, the constitutional provision cannot thereby be evaded; nor can the States, by granting franchises to corporations engaged in the business of transportation of persons or merchandise among them, which is itself interstate commerce, acquire the right to regulate that commerce, either by taxation or in any other way." So that the court must look at the nature or character of the business which is carried on by means of the franchises granted by the Legislature, and if it is commerce between the States or with foreign nations, the State cannot arrogate to itself the right to interfere with that business by evasively taxing the franchises.

*Norfolk Western Railroad Company* v. *Pennsylvania*, 136 U. S. 114.
*McCall* v. *California*, 136 U. S. 104.
*Lyng* v. *State of Michigan*, cited supra.
*Cook* v. *Pennsylvania*, 97 U. S. 566.
*Ferry Co.* v. *Pennsylvania*, 114 U. S. 196.
*Robbins* v. *Taxing District of Shelby Co.*, 120 U. S. 489.

It must be quite unnecessary to enter upon a review of the cases found in recent reports upon this question. If, as in the case of *Norfolk, etc., Railroad Co.* v. *Pennsylvania*, a license tax on the privilege of keeping an office in the State, or a license tax for doing business as a soliciting agent, as in *McCall* v. *California*, or a license tax for doing business as a drummer, as in *Robbins* v. *Shelby Taxing District*, were held to be a burden upon interstate commerce and an attempt upon the part of the States to regulate its exercise, how much more must a tax imposed for the privilege of wholly carrying on interstate commerce be a violation of the provisions of the Constitution?

The writ upon which this suit is based (found in the record,

page 3), shows that the nature of the tax was an excise tax for the privilege of exercising these franchises.

I call the attention of the court to the case of *Pickard* v. *Pullman Southern Car Company*, cited *supra*, where a "privilege" tax was the subject of consideration.

This was a case where a privilege or license tax of fifty dollars per sleeping car run over any railroad in Tennesee, was imposed under an act of the Legislature of that State, upon the defendant in error. The Court held it could not be upheld. The Court said, "The question involved in this case was before the Court of Chancery of Tennesee, in *Pullman Southern Car Company*, v. *Gaines*, 3 Tenn. Ch. 587, on the same facts as to the privilege tax for 1877. That Court held (and it is stated that the Supreme Court of Tennessee, on appeal affirmed its ruling), that this privilege tax as to such of the cars as passed and repassed through the State, and did not abide in it, was not amenable to the objection, that it interfered with interstate commerce. The view taken was that the property of the foreign corporation, used in Tennessee, could be taxed as property or by an excise on its use, and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. *We have given to the views set forth by the Tennessee Chancery Court the consideration due to the judgments of that tribunal, but are unable to concur in its conclusion.*"

The reasoning of the Court in this case is conclusive in the present contention that this privilege tax cannot be upheld.

The great variety of cases which have been brought to the attention of this court demonstrates that local legislatures find it very hard to give up the privilege of taxing commerce between the several States, and the means by which such commerce is carried on.

Sometimes ingeniously, but more frequently with little skill and exactness, these acts are framed to accomplish directly or indirectly the purpose of regulating interstate traffic. It is submitted, however, that legislative declarations cannot change the facts of any given case. It does not make it the less an attempted regulation of such commerce to declare that the articles taxed are only such as are within the limits of the State. The question still remains; is, as matter

of fact, the tax one which effects commerce between the States or commerce with foreign countries, either directly or indirectly? Does it impose any burden upon such commerce or in other ways effect the transaction of such business or the means by which it is carried on? Wherever there is such an effect the constitutional prohibition will be enforced.

As said by Justice Miller, "*By no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce.*"

Nor under the provisions of the Constitution can commerce with foreign countries be regulated by a State. This court has said in *Fargo* v. *Michigan*, cited *supra*, that Congress has freely taken this matter into its own hands although the regulation of commerce between the States was left until a later date.

A. A. STROUT,
*Counsel for Defendant in Error.*

## APPENDIX A.

### LAWS OF THE STATE OF MAINE FOR 1881.

CHAPTER 91.

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AN ACT RELATING TO THE TAXATION OF RAILROADS.

*Be it enacted by the Senate and House of Representatives in the Legislature, assembled, as follows:*

SECT. 1. The buildings of every railroad corporation or association, whether within or without the located right of way, and its lands and fixtures outside of its located right of way, shall be subject to taxation by the several cities and towns in which such buildings, land and fixtures may be situated, as other property is taxed therein.

SECT. 2. Every corporation, person or association, operating any railroad in this state, shall pay to the state treasurer, for the use of the state, an annual excise tax, for the privilege of exercising its franchises in this state, which, with the tax provided for in section one, shall be in lieu of all taxes upon such railroad, its property and stock. There shall be apportioned and paid by the state from the taxes received under the provisions of this act, to the several cities and towns, in which on the first day of April in each year, is held railroad stock hereby exempted from other taxation, an amount equal to one per centum on the value of such stock on that day, as determined by the governor and council; *provided, however*, that the total amount thus apportioned on account of any railroad shall not exceed the sum received by the state as tax on account of such railroad.

SECT. 3. The amount of such tax shall be ascertained as follows: The amount of the gross transportation receipts as returned to the railroad commissioners for the year ending on the thirtieth day of September next preceding the levying of such tax, shall be

divided by the number of miles of railroad operated to ascertain the average gross receipts per mile; when such average receipts per mile shall not exceed twenty-two hundred and fifty dollars, the tax shall be equal to one quarter of one per centum of the gross transportation receipts; when the average receipts per mile exceed twenty-two hundred and fifty dollars and do not exceed three thousand dollars, the tax shall be equal to one half of one per centum of the gross receipts; and so on increasing the rate of the tax one quarter of one per centum for each additional seven hundred and fifty dollars of average gross receipts per mile or fractional part thereof, *provided*, the rate shall in no event exceed three and one quarter per centum. When a railroad lies partly within and partly without this state, or is operated as a part of a line or system extending beyond this state, the tax shall be equal to the same proportion of the gross receipts in this state, as herein provided, and its amount determined as follows: the gross transportation receipts of such railroad, line or system, as the case may be, over its whole extent, within and without the state, shall be divided by the total number of miles operated to obtain the average gross receipts per mile, and the gross receipts in this state shall be taken to be the average gross receipts per mile, multiplied by the number of miles operated within this state.

SECT. 4. The governor and council, on or before the first day of April in each year, shall determine the amount of such tax, and report the same to the state treasurer, who shall forthwith give notice thereof to the corporation, person or association, upon which the tax is levied.

SECT. 5. Said tax shall be due and payable, one-half thereof on the first day of July next after the levy is made, and the other half on the first day of October following. If any party fails to pay the tax, as herein required, the state treasurer may proceed to collect the same, with interest, at the rate of ten per cent. per annum, by an action of debt, in the name of the state. Said tax shall be a lien on the railroad operated, and take precedence of all other liens and incumbrances.

SECT. 6. Any corporation, person or association aggrieved by the action of the governor and council in determining the tax, through error or mistake in calculating the same, may apply for an abatement of any such excessive tax within the year for which such tax is assessed, and if, upon re-hearing and re-examination, the tax appears to be excessive through such error or mistake, the governor and council may thereupon abate such excess, and the amount so abated shall be deducted from any tax due and unpaid, upon the railroad upon which the excessive tax was assessed; or, if there is no such unpaid tax, the governor shall draw his warrant for the abatement, to be paid from any money in the treasury not otherwise appropriated.

SECT. 7. If the returns now required by law, in relation to railroads, shall be found insufficient to furnish the basis upon which the tax is to levied, it shall be the duty of the railroad commissioners to require such additional facts in the returns as may be found necessary; and, until such returns shall be required, or, in default of such returns when required, the governor and council shall act upon the best information they may be able to obtain. The railroad commissioners shall have access to the books of railroad companies, to ascertain if the required returns are correctly made; and any railroad corporation, association, or person operating any railroad in this state, which shall refuse or neglect to make the returns required by law, or to exhibit to the railroad commissioners their books for the purposes aforesaid, or shall make returns which the president, clerk, treasurer, or other person certifying to such returns knows to be false, shall forfeit a sum not less than one thousand dollars, nor more than ten thousand dollars, to be recovered by indictment, or by an action of debt in any county into which the railroad operated may extend.

SECT. 8. All acts and parts of acts inconsistent with this act, are hereby repealed, except as to all taxes heretofore assessed, and this act takes effect when approved.

Approved March 17, 1881.

142-236

142-236

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1891.**

No. 1065.

JOHN S. MARTIN, APPELLANT,

*vs.*

JESSE S. GRAY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

**FILED MARCH 18, 1891.**

# SUPREME COURT OF THE UNITED STATES.

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*vs.*

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY

INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Bill of Complaint | 1 | 1 |
| Subpœna | 7 | 4 |
| Marshal's return | 8 | 5 |
| Demurrer to bill | 8 | 5 |
| Bill of amendment | 9 | 5 |
| Decree and allowance of appeal | 10 | 6 |
| Opinion | 11 | 6 |
| Clerk's certificate | 17 | 10 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 24, 1891.

1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the city of Louisville on Monday, October 6th, 1890.

Present: Hon. John W. Barr, district judge of the United States for the district of Kentucky.

JOHN S. MARTIN, Complainant,
*vs.*
JESSE S. GRAY, Defendant.

Be it remembered that heretofore, to wit, 29th day of September, 1890, came Lewis N. Denbitz, counsel for complainant, and filed his bill in equity against the above-named defendant; which bill is as follows:

In the Circuit Court of the United States for the District of Kentucky.

*The Bill of Complaint of John S. Martin against Jesse S. Gray, Exhibited on the 23d Day of September*, 1890.

To the honorable the judges for the sixth judicial circuit and district of Kentucky, sitting in equity:

Showeth your orator, John S. Martin, a citizen of the State of Kansas, who complains herein of Jesse S. Gray, a citizen of Kentucky—

That long before the 2d day of May, 1879, your orator and three other persons were the owners, in four undivided parts, of a lot of land in the city of Louisville, hereinafter described, the other three being your orator's mother, Nancy Martin, Mary M. McKinley,
2 wife of James C. McKinley, your orator's sister, and James W. Martin, your orator's brother, and the four parts were held with cross-remainder to the survivors in case of any of the four dying without issue. Your orator then had several children, and a defeasance of his estate by his dying without issue then was and still is very improbable. The lot of land is described as lying at the northwest corner of Main and Seventh streets, fronting fifty-three feet on Main street and running back along Seventh street and in a line parallel thereto one hundred and five feet. The lot was then subject to a lease made by the four joint owners to one Thomas Slevin, who had built a house or houses of great value upon the same, and under the lease had privileges amounting to an ownership of the improvements, and in return therefor had agreed to pay to the owners of the fee one-half of the net rents that he would collect for the occupation of the lot with the houses thereon. The terms of said holding will more fully appear from a copy of said lease, which is by your orator exhibited with this his bill of complaint.

Your orator further says that long before said 2nd day of May, 1879, namely, on the 9th January, 1865, your orator made his certain promissory note in writing, whereby he promised to pay to said Thomas Slevin, in two years thereafter, the sum of two thousand dollars, with interest from date at the rate of six per cent. per annum, and to secure said note he made and executed his deed of mortgage in favor of said Thomas Slevin, conveying to him his interest of one undivided one-fourth in said lot and its appurtenances, which deed is of record in the clerk's office of the Jefferson county court, in Deed Book 121, page 11. Interest on said note has been paid regularly to January 9th, 1869, by applying to the same a part of the rents coming to your orator under the lease to Thomas Slevin; but after said date the account was not well kept, and said Thomas Slevin refused to keep down the interest thereafter by applying the rents, but claimed to set those rents off against goods furnished to your orator.

Your orator further says that at some time in the year 1877 Thomas Slevin, the payee in said note, endorsed and assigned the note for $2,000 to the defendant, Jesse S. Gray, who thus became the owner of said note and of the mortgage made to secure the same.

And your orator further represents that on or about the 21st day of February, 1877, being after the assignment of said note, said Thomas Slevin, by the adjudication of the honorable the district court of the United States for the district of Kentucky, became a bankrupt within the true meaning of chapter 61 of the Revised Statutes of the United States, and such proceedings were had in and about his bankruptcy that on the 21st day of February, 1877, one Stephen E. Jones was elected his assignee and was confirmed by said district court and a deed of all the property of said bankrupt was made to him by one of the registers of the court.

Your orator further says that on the 5th day of February, 1878, said Stephen E. Jones, styling himself assignee of Thomas Slevin, filed his bill in equity in the district court of the United States at Louisville, No. 5306 on the docket of civil cases under the bankrupt's jurisdiction, to which bill in equity he made James C. McKinley, Mary M. McKinley, John B. Martin (the husband of Nancy B. Martin), said Nancy B. Martin, James W. Martin, your orator, and his wife, Mary A. Martin, and the defendant, Jesse S. Gray, parties defendant, and in his bill among other things he set up the note for two thousand dollars and mortgages hereinabove described, and stated that the same had before his bankruptcy been assigned to Thomas Slevin to said Jesse S. Gray as collateral security for said debt of $1,000, and that the same was wholly due, and that no interest had been paid thereon from and after January 9th, 1879.

Your orator further says that he never appeared or answered in said cause, and no one appeared for him, as by the orders and record therein, still remaining in the district court aforesaid, fully appears, nor was there any service of the subpœna upon him otherwise than that the following return appears upon the subpœna issued in said cause and which is on file with the papers thereof:

"J. C. Hays, S. H. C., is hereby appointed special bailiff to execute the within subpœna on J. S. Martin and Mary A. Martin, February 13th, 1878.

R. H. CRITTENDEN,
*U. S. Marshal.*"

"Executed the within spa. on J. S. Martin and Mary A. Martin by delivering a copy to each in person, Feb'y 14th, 1878.

R. H. CRITTENDEN,
*U. S. Marshal.*

J. C. HAYS,
*S. H. C., Special Bailiff.*"

And that there was no such service also appears from the record and papers in said cause still remaining therein; yet, although your orator never appeared or answered in the cause and was never subpœnaed to answer therein, the complainant in said cause,
5 Stephen E. Jones, assignee of Thos. Slevin, on the second of May, 1879, obtained from said district court a pretended decree purporting to foreclose the equity of your orator in the one undivided fourth part of the lot and privileges thereto belonging, and that the farm be sold on the terms therein stated, and R. H. Crittenden was by said pretended decree appointed a special commissioner of said court to carry the same into effect, the sale to be made to satisfy said sum of $2,000, with interest from January 9th, 1869, and the pretended costs adjudged against your orator in and about said cause.

And your orator further says that soon thereafter, viz., on the 11th day of August, 1879, said R. H. Crittenden, pretending to act as special commissioner of said district court in that behalf, proceeded to sell the interest of your orator above more fully described, at public outcry, when defendant, Jesse S. Gray, became the highest bidder, and said Crittenden returned him as such to the honorable the district court in a report of sale made on the 18th day of August, 1879; and such proceedings were thereupon had that upon the 30th day of September, 1879, by a pretended order of said district court, the said pretended sale of your orator's interest to the defendant, Jesse S. Gray, was confirmed and a deed was thereupon made to him by said special commissioner purporting to convey the same to him; and said defendant thereupon took possession of said one-fourth interest and collected from the persons holding the lease under said Thomas Slevin, the one-fourth of the rent going to the owner of the ground, and is still collecting such one-fourth of such rents.

Your orator further says that the defendant, Jesse S. Gray,
6 has out of said rents collected enough money from time to time to pay off almost the whole sum due by your orator on mortgage, with current interest; but your orator cannot state exactly the amount of rents thus received by the defendant.

And your orator, being without adequate remedy at the common law, brings this his bill of complaint before your honorable court, before whom matters of equity can be properly adjudged; and to the end that the defendant may, upon his corporal oath, answer the in-

terrogatories to him propounded and subjoined to this bill, and that he may answer the matters of the bill other than those comprised in said interrogatories without oath; and to the end, further, that upon the hearing of this cause the pretended decree and sale and confirmation thereof and commissioner's deed of your orator's interest to the defendant be set aside and held for naught, and that he be credited with all the rents received by the defendant, and be allowed, after a full and just statement of the accounts, to redeem the mortgage upon his interest, or to have said one-fourth resold to satisfy the amount still due on said mortgage, and that he may have all other proper relief which may be due him in equity and justice—

Your orator prays the writ of subpœna of the United States, to be directed to the defendant, Jesse S. Gray, commanding him to answer this bill and to submit to such decree as may be rendered thereon; and thus will ever pray.

LEWIS N. DENBITZ,
*Solic't. & Counsel for Complainant.*

7 Interrogatories.—How much money have you received by reason of the one-fourth interest in the Martin lot bought by you at the sale in bankruptcy? When and in what sums did you receive it? Can you give a detailed statement down to the present time? What arrangement have you now for receiving further payments thereon?

Upon which bill there issued the following subpœna in chancery:

The President of the United States of America to Jesse S. Gray, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in November next, to answer a bill in equity exhibited against you in our said court by John S. Martin.

Which you shall in nowise omit under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court, hereto affixed at the clerk's office of said court, in Louisville, this 29th day of Sept., A. D. 1890, and in the 115 year of our Independence.

Attest:

SAM'L B. CRAIL,
*C. C. C., K. D.*,
By HENRY F. CASSIN,
*His Deputy.*

MEMORANDUM.—The defendant is to enter his appearance in the suit, in the clerk's office, on or before the 3d day of November next, the day at which the writ is returnable; otherwise the bill may be taken *pro confesso*.

SAM'L B. CRAIL, *Clerk*,
By HENRY F. CASSIN,
*His Deputy.*

8 Executed August 30, 1890, on Jesse S. Gray by delivering to him a true copy hereof.

D. J. BURCHETT, *U. S. M.*,
By C. J. HOWES, *D. M.*

Fees, $2.00.

And on November 3d, 1890, came the defendant, by his counsel, James S. Pirtle, and filed his demurrer herein, which is as follows:

United States Circuit Court, District of Kentucky.

JOHN S. MARTIN
*vs.*
JESSE S. GRAY. } Demurrer.

The defendant, Jesse S. Gray, demurs to the bill of complaint herein, and for causes of demurrer says the complainant's said bill of complaint, in case the same were true, which this defendant does in nowise admit, contains not any matter of equity wherein this court can grant any decree or give the complainant any relief or assistance as against him, the defendant.

JAMES S. PIRTLE, *Counsel.*

Certificate & affidavit waived.

L. N. DENBITZ,
*For Compl't.*

Complainant, by counsel, files his bill of amendment, which is as follows:

9 Whereupon the court directs the following order made:

United States Circuit Court, Kentucky District.

TUESDAY, *Feb'y 10th*, 1891.

JOHN S. MARTIN
*vs.*
JESSE S. GRAY. } In Equity.

The court now, being sufficiently advised, renders the opinion that there is no equity in the bill, and that the demurrer thereto should be sustained; whereupon the complainant, by leave of court, files his bill of amendment herein, which is made part of the record and proceedings herein.

And thereupon the def't, by counsel, insists upon his demurrer to the bill as amended.

And the demurrer coming on to be heard, and the court being fully advised, it is ordered, adjudged, and decreed that there is no equity in the bill as amended, and the demurrer thereto is sustained; whereupon it is further ordered, adjudged, & decreed that the bill be dismissed, and that the defendant recover his costs herein by him expended.

And thereupon the complainant prays an appeal to the honorable the Supreme Court of the United States, which is granted.

The amended bill above referred to is as follows:

10 U. S. Circuit Court, Ky. District.

JOHN S. MARTIN
*vs.*
JESSE S. GRAY. } Bill of Amendment.

To the hon. the judge of the U. S. circuit court, Ky. district:

Your orator, John S. Martin, represents by way of amendment to his original bill herein—

That at all the times when the suit of Jones ag'st McKinley & others, mentioned in the original bill, was pending in the district court for the Kentucky circuit, and even since July 27th, 1870, to this day, there were in force in s'd court certain general orders made by s'd court in pursuance of statute on s'd July 27th, 1870, & spread on its records, to govern proceedings in equity causes under the bankrupt jurisdiction; that by said general orders the rules of the Supreme Court in equity, published in 1844, and more particularly rules (13) thirteen & fifteen (15) of s'd rules, were adopted to govern such proceedings, & s'd rules were in force when the proceedings against this complainant ending in the pretended decree & attempted sale took place. He also says that the interest involved herein is worth the sum of eight thousand dollars.

Your orator prays as he has in his original bill prayed.

LEWIS N. DENBITZ,
*For Complainant.*

The written opinion of the court is as follows:

11 JOHN S. MARTIN, Complainant,
*vs.*
JESSE S. GRAY, Defendant. } Opinion on Demurrer.

The complainant seeks to redeem a mortgage given by him on property in this city which has already been sold under a proceeding in equity instituted in the district court by an assignee in bankruptcy, and there can be no doubt that the present bill cannot be maintained if the court, in the equity proceeding instituted by the assignee in the district court, had jurisdiction by a proper service of the subpœna on complainant.

The subpœna in that cause was in the usual form, and the bill alleges that complainant never appeared or answered in said cause, and no one appeared for him, * * * nor was there any service of the subpœna upon him otherwise than that the following return appears upon the subpœna issued in said cause and which is on file with the papers thereof:

"J. C. Hays, S. H. C., is hereby appointed special ba-liff to execute the within subpœna on J. S. Martin and Mary A. Martin, February 13th, 1878.

R. H. CRITTENDEN,
*U. S. Marshal.*"

Executed the within spa. on J. S. Martin and Mary A. Martin by delivering a copy to each in person, Feb'y 14th, 1878.

R. H. COURT,
*U. S. Marshal.*
J. C. HAYS,
*S. H. C., Special Ba-liff.*

12 The bill of complaint alleges that the district court took jurisdiction without any other service of the subpœna and decreed a sale and sold the same by the said Crittenden, as special master, which sale was confirmed and deed made all in the year 1877.

The defendant Gray, who was the purchaser at said sale, has filed his demurrer to the bill because of a want of equity. This raises the question of whether the service of the subpœna in the equity proceeding on the complainant Martin brought him before the court so as to give it jurisdiction.

Equity rule 15 provides — declares that "the service of all process, mesne and final, shall be by the marshal of the district or his deputy or by some other person specially appointed by the court for that purpose, and not otherwise. In the latter case the person serving the process shall make affidavit thereof."

This rule is to be construed with reference to the powers and authority of marshals at the time of the alleged execution of the subpœna issued from the district court in the equity case, as it will be assumed from the allegations of the amended bill that the equity causes in that court were governed by the equity rules adopted by the Supreme Court. Sec. 788 of Revised Statutes declares that "the marshals and their deputies shall have in each State the same powers in executing the laws of the United States as the sheriffs and their deputies in such States may have by law in executing the laws thereof."

The language of this section is the same as that of the previous acts of 1795 and 1861—see Stat. at Large, vol. 1, p. 425; vol. 12, p. 282—except the word may is added. This change in the language, if it makes any change in construction, would not effect the

13 present question, as to the sheriffs and deputies in Kentucky had the same authority and powers in 1861 and 1873 as in 1879, when the subpœna was returned executed in the equity proceedings in the district court.

It is not alleged in the bill that R. H. Crittenden was not at the time, 1879, marshal for the district of Kentucky, or that J. C. Hays was not a general deputy marshal; but this court, in the absence of allegation, should assume, if, indeed, it does not judicially know, that R. H. Crittenden was at the time the marshal of the district. The character of the endorsement and return would indicate that J. C. Hays was not a general deputy of s'd Crittenden, but only appointed for the special service, and the question is, Could Mr. Hays lawfully perform that special service and has he done so? The Kentucky statute provided that "a sheriff may, by writing, empower any person to execute an original or mesne process. The person so appointed

the words "and not otherwise," in the 15th rule, but these words cannot be construed — limiting the powers *the powers* of the marshal as to the appointment of his deputies, but rather that persons not having any authority as marshal or from him should not execute the subpœna, except he be appointed by the court for that purpose.

It was then the habit in some of the States to have the subpœnas out of chancery to be executed by any person, without any appointment or authorization; this was the fact in Maryland and in New Jersey. See 1st Bland, 29–132; 1st Green Ch., 309. And even in Kentucky such service was good if proven by proper affidavit. 2d Bibb., 93. "It is not material to determine whether the execution of this subpœna shall be considered as the act of J. C. Hays, a deputy of the marshal, or by the marshal himself by and through his agent, Hays. The return is that of the marshal in his official character and for which he is responsible officially, and the service is not null and void. I conclude that the demurrer should be sustained, and it is so ordered.

JNO. W. BARR.

DISTRICT OF KENTUCKY, *ss.*

I, Samuel B. Crail, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify
18 that the foregoing seventeen pages contain a true and complete transcript of the record of the proceedings had in the court in the case mentioned in the caption hereof.

Seal 6th Circuit Court, Ky. Dis., U. S. of America. Witness my hand and seal this 7th day of March, 1891.

SAML B. CRAIL, *Clerk.*

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19 Supreme Court of the United States.

JOHN S. MARTIN, Complainant & Appellant,
*against*
JESSE S. GRAY, Appellee. } Transcript.

Appeal from circuit court of the United — for the Kentucky district.

Decree appealed from is entered on February 10th, 1891, & is found on page 19 of the transcript.

The appeal is prayed below & granted on the same day & is appended to the decree.

LEWIS N. DENBITZ,
*Solicitor for Appellant.*

Endorsed on cover: Kentucky C. C. U. S. No. 1065. John S. Martin, appellant, *vs.* Jesse S. Gray. Filed March 18, 1891.

Office Supreme Court U. S.
FILED,
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JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States

JOHN S. MARTIN, - - - Complainant and Appellant,

*AGAINST*

JESSE S. GRAY, - - - - - - - - - Appellee.

## BRIEF FOR APPELLANT.

On Appeal from the Circuit Court for the District of Kentucky.

**LEWIS N. DEMBITZ,**
For Appellant.

*The Bradley & Gilbert Co., Print., Louisville, Ky.*

# IN THE SUPREME COURT OF THE UNITED STATES.

JOHN S. MARTIN, *Complainant and Appellant,*

*AGAINST*

JESSE S. GRAY, - - - *Appellee.*

**Brief for Appellant.**

ON APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

## STATEMENT OF FACTS.

In 1878 Stephen E. Jones, assignee in bankruptcy of Thos. Slevin, brought a suit in equity, under the bankrupt jurisdiction, against McKinley and wife and others, among them the appellant, John S. Martin. The cause of action against him was a promissory note for $2,000, with some accrued interest, which Slevin, the bankrupt, had assigned to Jesse S. Gray, the appellee, as collateral for a somewhat smaller debt. Gray was made a defendant.

There was no appearance or defense by Martin, but a subpœna issued, on which the only return affecting him was the following:

"J. C. Hays, S. H. C., is hereby appointed special bailiff "to execute the within subpœna on J. S. Martin and Mary "A. Martin. February 13, 1878.

"R. H. CRITTENDEN, *U. S. Marshal.*

"Executed the within spa. on J. S. Martin and Mary A. "Martin by delivering a copy to each in person, Febr'y "14th, 1878. R. H. CRITTENDEN, *U. S. Marshal.*

"J. C. HAYS, S. H. C., *Special Bailiff.*"

The mortgage rested upon Martin's one-fourth interest in a lot fronting fifty-three feet on Main Street, in Louisville, subject to a building lease.

In 1879 a decree was taken in "Jones *v.* McKinley" to sell the defendant's interest, and Gray became the purchaser at somewhat less than the amount then due him. He obtained a commissioner's deed, and has been collecting one-fourth of the ground rents ever since.

In 1890, John S. Martin, now a citizen of Kansas, brought the present suit in the Circuit Court of the United States for the District of Kentucky against Jesse S. Gray, a citizen of Kentucky, in which he seeks to redeem the mortgage. He states in his bill of complaint that there was such a suit as Jones *v.* McKinley, but that he had never appeared in it, and there is not in the record or papers of that suit, or ever was, any other service except that given above, which is copied into the bill. He takes the ground that the decree rendered against him by default, and the sale, confirmation of sale, and conveyance thereunder, are all null and void, and that Gray has, in the rents, collected nearly or quite all that was due on the mortgage. In a bill of amendment it is stated that the interest sought to be redeemed is worth eight thousand dollars. It is also stated that the District Court of the District of Kentucky had, before the suit of Jones *v.* McKinley had been brought, namely, in 1870, adopted the "rules in equity" as far as applicable, for equity business under the bankrupt jurisdiction, and more especially rules 13 and 15.

There was a demurrer to the bill which was sustained by the Circuit Court (see opinion by District Judge Barr in the transcript), and the bill was dismissed.

ASSIGNMENT OF ERROR.

Appellant maintains that the demurrer to the bill should have been overruled. It was sustained because the return given above was deemed sufficient. We say that it was wholly insufficient to bring Martin before the court, and that upon the facts shown in our bill of complaint the decree of the District Court and proceedings thereunder were void and should have been held for nought, and the present complainant should have been allowed to redeem his one-fourth interest without reference to the pretended judicial sale. The Circuit Court erred in overruling the demurrer to the bill.

## ARGUMENT.

We wish to state at the beginning that the result of our suit, if successful, can not be such as to displace any long-continued possession. The landed interest in dispute is one-fourth of a town lot, subject to a building lease. The defendant, as purchaser, has received his share of ground rent; should we gain our suit, the rents will be applied to the principal and interest of our debt; he will not even bear the loss, which is implied, in receiving simple interest for a forbearance of many years. His only loss will be the failure to realize a little fortune by the mishap and embarrassment of the complainant. The latter may, therefore, with good conscience and with good grace and perfect fairness, rely upon his strict rights. The District Court had no jurisdiction over Martin, and his land, except as a claim against him with a lien upon the land, was in name a part of the bankrupt Slevin's assets. It was authorized by statute to adopt rules of practice. It could acquire its jurisdiction over him only by a fair compliance with those rules. We shall endeavor to show to your Honors—

*First*—That no service of the subpœna appears by this return; it is wholly worthless by any test that can be applied to it.

*Secondly*—That a decree and decretal sale based on such a return alone are null and void, both under the jurisprudence of the United States and under that of Kentucky, in which the land is situate. In fact, the latter proposition was admitted in the court below, both by the defendant and the Judge, the argument and opinion turning only upon the former point.

THE RETURN.

The following two rules in equity bear upon the case:

"*Rule XIII.*

"The service of all subpœnas shall be by a delivery of a "copy thereof *by the officer serving the same* to the defendant "personally, or by leaving a copy thereof at the dwelling-"house, or usual place of abode of each defendant, with some "adult person who is an adult or resident of the family.

"*Rule XV.*

"The service of all process, mesne and final, shall be by "the marshal of the district or by his deputy or by some "other person appointed by the court for that purpose, "*and not otherwise.* In the latter case, the person making "service shall make affidavit thereof."

The bill of amendment shows that both of these rules had been adopted by the District Court for the suits in equity under the bankrupt jurisdiction.

The following section of the Rev. Stat. U. S. is relied on by the appellee:

"§ 788. The marshals and their deputies shall have in "each State the same powers in executing the laws of the "United States as the sheriffs and their deputies in such States "*may* have by law in executing the laws thereof."

This brings up the two following provisions of Kentucky law:

*The First*, in the General Statutes of Kentucky, being in force when the R. S. U. S. came into force:

"Chapter 100, section 7.

"A sheriff may, by writing, empower any person to ex-"ecute an original or mesne process. The person so ap-"pointed shall indorse his action on the instrument empow-"ering him, and shall make affidavit to the truth of the in-"dorsement and attach the same to the process, and deliver "the indorsement and affidavit to the sheriff or his deputy, to "be returned to the proper office. The indorsement, made "as above directed, shall have the same validity and effect in "law as if made by the sheriff."

*The Second*, in the Code of Practice of 1876, in force in 1878, when the return in question was actually made:

"§ 47. The summons may be served—

"1. By the officer to whom it is directed or any officer to "whom it might have been directed, and his return thereon "shall be proof of the time and manner of service.

"2. By any person appointed by the officer to whom it is "directed, by an indorsement on the summons; and the affi-"davit of such person indorsed thereon shall be proof of the "manner and time of service."

It is very clear that "his deputy" in the fifteenth rule does not mean a bailiff, or a person specially deputed, either by the principal or by a general deputy, to serve a single writ or process. The words "his deputy" are taken from Section 27 of the Judiciary Act, which prescribes for "every Marshal or his deputy" the following oath:

"I, A. B., do solemnly swear or affirm, that I will faith-"fully execute *all* lawful precepts directed to the Marshal of "the District of ———, under the authority of the United "States, and true return make and in all things well and truly "... perform the duties of Marshal (or *deputy* Marshal "as the case may be) of the District of ———, during my "*continuance* in office, etc."

The law contemplates a deputy who may serve all precepts, and one who continues in office. This section stands now as Section 732 of the Revised Statutes.

Of course, where a man acts as a general deputy, and is believed to be such, his failure to take the oath could not invalidate the process: for he is an officer *de facto*. But the form of the oath shows what kind of an officer is meant by the law; and that one who only claims the right to serve *one* precept, and does not claim a *continuance* in office, is not a deputy.

In this case the man who serves the writ is called in his appointment a "special bailiff to execute the within subpœna," and he signs himself accordingly. He is not a deputy marshal *de facto*. He disclaims being such.

The first rule in admiralty, which requires all process in that branch of the law to be served by the marshal or his deputy, unless he be a party to the suit, has been thus construed by Judge Choate, of the Eastern District of New York, *in re* Gorgas, 10 Benedict, 640, in an opinion, which, though it has been quoted against us, supports our views thoroughly.

He says, on page 469 of the Report: "Undoubtedly the "word deputy means 'deputy marshal,' an officer known to "the law as such, who equally with the marshal may do all "that is to be done under the process. It can not mean, as "used under this rule, a person specially deputed to execute a "process, or arrest a vessel." (And he refers for definition of the word "deputy marshal" to the Revised Statutes, §§ 780–782.) See page 466 of the Report.)

If the word has this meaning under the admiralty rule, there are three additional reasons for thus construing the rule in equity. *First*, the court, sitting in equity, may appoint a stranger to serve the process in all cases, while it can name a stranger for that purpose in admiralty cases, only when the marshal is a party to the case; hence, not near as much inconvenience can arise in equity cases from the scarcity of sworn deputies as in admiralty cases. *Secondly*, the equity rule adds the words "and not otherwise." *Thirdly*, the rule in equity requires the person appointed by the court to make

an affidavit of service, which is not required from a marshal or "his deputy." It is therefore clear that a sworn officer must be meant when "his deputy" is mentioned, whose oath taken upon entry into office would be an equivalent to a stranger's oath to the return. A mere special bailiff has taken no oath to return all precepts truly, and the rule would not dispense him from an affidavit to the return, any more than the person chosen by the court.

But we need no stronger proof of the meaning of the words "his deputy," than section 9 of the Force Act of 1795, now forming § 788 of the Revised Statutes, which the appellee so much relies on. It was first enacted during the "Whisky Rebellion," and again during the great rebellion of 1861, that the marshals holding Federal precepts might enforce them against all resistance, like the sheriffs may do under the laws of the States, and for that purpose to appoint *special* deputies, and to call out the *posse comitatus*. This may, under these acts or under Section 788, be done by "the marshals and their deputies." A broad line is here drawn between a deputy who can appoint a bailiff or special, and the bailiff himself who can not appoint another bailiff; between a sworn permanent officer who can call out the power of the district, and an unsworn private citizen who can not.

It happens that the bailiff in this case was appointed by R. H. Crittenden, the United States Marshal himself. If a bailiff could be appointed at all, he might as well have been named by any one of the deputy marshals; certainly, under Section 788, which refers to this matter to the law of the several States; for in Kentucky this matter has been expressly decided, Norman *v.* Norman, 6 Bush, 495, and this seems to be the rule in all the States.

We have shown clearly that the 15th rule, in speaking of a deputy, does not contemplate a special bailiff.

But it is maintained that this rule must be construed according to the common law principle, under which a sheriff may perform any ministerial act through a third person.

But if the "marshal or his deputy" may act thus, the person appointed by the court as a third alternative must have the same power, and this will hardly be contended for.

If this doctrine ever applied in Federal jurisprudence, it was abrogated as to subpœnas by the express words of "Rule 13," and as to them and all other process by the acts of 1795 and 1861, re-enacted in Section 788, which put the law of the particular State in the place of that general doctrine. This State law the marshal must follow if he wishes to avail himself of the services of other persons. Has he followed the local law? We say he has not.

It is true that it was held in Kentucky, in 1824, in Sergeant of the Ct. of App's *v.* George, 5 Litt., 198, that a deputy sheriff or a deputy sergeant may serve a summons through a third person. But in that case the general deputy had made the return in his own name; the fact of the service being made through a stranger came to light only by an averment outside of the record, in a bill to set aside the judgment by default. And apparently to do away with the mischief disclosed by this case, the Kentucky Legislature, in 1828, passed a law on this subject (Mar. & Br. Stat. II, 1469), which limits the cases in which a bailiff may be appointed by the sheriff or deputy sheriff, and adds: "The person thus specially deputed shall make his return upon oath."

And thus the law has stood substantially since 1828: that is, both when the act of Congress of 1861, and again when the R. S. U. S., in 1874, clothed the United States Marshals with the powers then enjoyed by the sheriffs in the several States; not with the powers which those sheriffs may have enjoyed in 1824. By an awkward overlapping between the Code of Practice, as adopted in 1851, 1854, and 1876, and the Revised Statutes, as adopted in 1852 (as of August 1st), and the General Statutes taking the place thereof in 1873, some doubt may have arisen which of the two forms of the Kentucky law on service by bailiffs should be looked to—that of the Code, or that in the "Statutes." But it seems to us:

*First.* That the word "may" (the sheriffs and their depu-

ties *may* have) must have some effect, and at the time of the service in question, the Code of Practice, as the last deliverance of the law-maker, was undoubtedly in force, and it alone applies.

*Second.* That under the section quoted from the General Statutes, just as much as under § 47 of the Code of Practice, the affidavit of a bailiff as to the service of a summons becomes a part of the record, and its absence from the record renders the return defective. ("The person so appointed shall—deliver the endorsement and affidavit to the sheriff, etc.—to be *returned* to the proper office"), and only "the endorsement made as above directed," that is, when he "shall make affidavit of the truth of the endorsement" has "the same validity and effect in law as if made by the sheriff." Hence, the omission is under the General Statutes as fatal as under the Code of Practice.

In September, 1852, while the Code of Practice of 1851 *and* the Revised Statutes of 1852 were in force, the marshal of the Louisville Chancery Court had appointed a bailiff who had served a summons, and in his affidavit did not swear as to the service on some of the defendants. A judgment by default was rendered, and a decretal sale was had under it; the sale was confirmed and a deed made to the purchaser. The case was strictly analogous to the case at bar. After the sale had been confirmed and deed made in pursuance thereof, a new suit was brought by the defendants, the service on whom had been improperly returned, against the purchaser and others, to have the judgment, sale, and conveyance set aside as void; a suit exactly like ours. The court below having dismissed such suit, the Court of Appeals of Kentucky reversed the dismissal with the following mandate:

"Wherefore, said judgment is reversed, and cause re-"manded with directions to set aside the former judgment and "sale thereunder." Lloyd's adm'r *v.* McCauley's adm'r, 14 B. M., 535, 542, 543.

It is therefore clear that the return in "Jones *v.* McKinley"

made on the subpœna against John S. Martin can not gain any force from "the powers which the sheriffs and their deputies have under the laws of Kentucky."

In this connection the section of the General Statutes of Kentucky, following next after that quoted above, is of interest:

"§ 8. The sheriff shall be responsible for the acts of the "person so appointed, and such person shall be liable to a "prosecution for perjury if he willfully verify a false endorse- "ment by his affidavit." In other words, the Legislature thought that the bailiff's oath to the return was a valuable protection to the defendant.

The opinion of the court below (Tr., p. 7) says:

"The character of the endorsement and return would "indicate that J. C. Hays was not a general deputy of said "Crittenden, but only appointed for the special service, and "the question is, could Mr. Hays lawfully perform the service, "and has he done so?" The judge then quotes as the Kentucky Statute the provisions of the General Statute, not those of the Code of Practice, and rejects Lloyd's adm'r *v.* McCauley as authority, because it was decided under the Code of Practice; though a provision in the Revised Statutes, identical with those of the General Statutes, was then in force, and though the Code of Practice was in force in 1878. He also says: "There is no allegation in the bill that no affidavit was ever made or filed;" and it seems for that reason he held the bill defective. But the bill clearly avers that no such affidavit was filed in the papers of the case, and that is all that the complainant could know.

Its words are: "Nor was there any service of the sub- "pœna otherwise than that the following return appears "upon the subpœna issued in said cause and which is on file "with the papers thereof."

If, beside the return copied into the bill, there had been an affidavit of J. C. Hays, such as the General Statutes of Kentucky require, and that affidavit was filed among the papers, the above averment could not have been truthfully

made. Hence, the demurrer admits that there was no such affidavit on file with the papers in the case. If Mr. Hays made such affidavit, and put it into his desk: if he did not, in the words of the Statute, "attach it to the process and deliver the endorsement and affidavit to the" marshal or deputy marshal, to be *returned*, it is just the same as if he had never made the affidavit at all. If the papers in the case show the unsworn return, and show no other proof of service, we must, under the authority of Pennoyer *v.* Neff, assume that there was no other proof; and under the Kentucky law, as expressed in Lloyd *v.* McCauley, that there was no legal service; that the defendant was not before the court; that the judgment was void and the sale under it no sale.

Since the court below dismissed our bill, a Kentucky decision has been published in the "Kentucky Law Reporter" which greatly strengthens our position.

We quote from the opinion of Judge Pryor in Thompson *v.* Moore:

"As to the appellant, Thompson, it appears that the "sheriff had, by an indorsement on the summons, authorized "a special bailiff to execute it, as provided, etc.; that sum- "mons had been returned by special bailiff *not found* as to "Thompson, when an alias summons issued was served by "the same bailiff, without any indorsement by the sheriff, "giving this 'special bailiff' the power to execute it. The "power to serve had been exhausted by the deputy after his "return on the original summons *not found*, and a new power "had to be given authorizing him to serve the alias summons. "This was not done, and yet the sheriff was permitted to "amend what is called his return by making his indorsement "on the alias summons after the judgment had been ren- "dered. . . . The Code in this regard must be followed, "and no parol authority ought to be held sufficient to author- "ize a special bailiff to execute the summons." 12 Ky. L. R., 664.

In short, a "special deputy" is not a deputy at all. The law as to service by a "bailiff," that is, a person appointed

*ad hoc* must be strictly pursued. There seems to have been no question here but that Thompson was actually summoned; yet the judgment was set aside.

We take, however, a higher ground than the State law. The "rules in equity" of 1844 were proclaimed by this court under the authority of section 6 of an act of Congress of August 6th, 1842, which authorizes this court to make rules of practice in equity and admiralty causes, and winds up by giving this general power:

"And generally to regulate the whole practice of the said courts so as to prevent delays, etc."

The rules in equity have stood unimpeached for forty-nine years; no one on the bench or at the bar of this court has ever assailed any one of these rules as unauthorized, and I hope that I may here rely on all of them as being the law of the land.

Having been promulgated in 1844, and acted upon ever since, and being well known by the courts and the profession as the "rules in equity," they were confirmed by section 913 of the R. S. U. S., thus:

"The forms of mesne process and the forms and mode of "proceeding (which certainly includes the service and return "of process) in suits in equity and of admiralty and maritime "jurisdiction in the Circuit and District Courts shall be ac- "cording to the principles, rules and usages which belong to "courts of equity and admiralty respectively; except where "it is otherwise provided by the statute or by the rules made "in pursuance thereof."

By this section the rules in equity become, indeed, as much a part of the Revised Statutes as if they had been copied into them; they stand on an equal footing with section 788, which gives to the marshals the powers of State sheriffs; and if there is an apparent conflict between any one of the rules and this section, it must be solved like any other conflict in a statute, in favor of the special provision as against the more general.

Rule 13 in equity, which is part of section 913 of the R.

S. U. S., just as any one of the articles of war is part of another section, limits the general effect of section 788 upon all process by excepting from it subpœnas in chancery; if, indeed, such subpœnas were within the purview of that section.

"The service of all subpœnas shall be by a delivery of a copy thereof;" here the rule should have stopped, if its only object had been to choose the delivery of a copy as the only mode of service, as against reading the subpœna or handing to the defendant a mere "label," according to the English plan. If it had stopped there, it would have fully, almost literally, agreed with the clauses on the service of a summons in the Codes of Procedure of New York, Kentucky, Ohio, and other States. But the words follow, "by the officer serving the same," words which are not in this position in any of these Codes. What is the purpose of these words? Without them it might, perhaps, be argued that the officer (marshal, deputy marshal, or appointee of the court) might act through a third person; hence, the officer is told that he must deliver the copy himself. He is so told, because the reasons for allowing the officer to act through another in the execution of other process were wholly inapplicable to subpœnas.

To show the broad difference between other process and these subpœnas, we must go back to the time when the rules were drafted.

At or at least not long before that time, in most of the States an action of law, upon a money demand was begun by a *capias ad respondendum*. The defendant being arrested, no question could arise as to the truth of the return which brought him into court; it was *cepi corpus;* he could never claim to be ignorant of the pendency of the action. The service of the process was an act of force; and as the sheriffs and marshals are not chosen for their *physique*, the resort to bailiffs was natural and general. A subpœna in chancery, on the other hand, is a mere notice. Under the old practice in chancery, such as it came to us from England, this notice did

not even justify a default; but process of contempt had first to be exhausted (attachment, then attachment with proclamation, then a commission of rebellion, then a sergeant-at-arms, lastly a sequestration) before a decree *pro confesso* could be had, and not even then in all cases. But now the rules in equity, 18 and 19, provide for a *pro confesso* and then for a final decree upon the service of the subpœna alone, without any further process. It becomes, therefore, of the utmost importance for the court to know, with certainty, that the defendant has actually been served with the subpœna. The strength or skill or discretion of the officer are not here in question, as in making an arrest; it is a simple question of truthfulness, "has the copy been delivered?" Whom can we trust with certifying to us this all-important fact?

The judges who sat on this bench in 1844 thought that for the security of the defendant two elements should concur; *first*, the man who certifies to the truth of the return must be a man picked out for that duty by high authority; *second*, he must be sworn. And both these requisites are found in the fifteenth and thirteenth rules. It must be a picked man; either the marshal himself, selected by the President of the United States, or a deputy to whom such marshal is willing to entrust his whole business and all his powers, or lastly a person chosen by the court for that purpose; and the man must be sworn, either by taking the oath of office that he will truly return *all* precepts; or, if chosen by the court, he must make affidavit to the service of the particular process.

Were a bailiff allowed to serve a subpœna in chancery, the security of having a picked man, a man of standing, to certify to the service would be entirely lost, even should he make the affidavit as he does under the Kentucky State practice.

By the failure of the special bailiff, in this case, to swear to his return, the real or apparent conflict between rule 13, with its words requiring the officer himself to make the delivery, and section 788 of the Revised Statutes of the U. S., becomes irrelevant; because the return is as worthless under the State practice, adopted by the latter section, as it is under the Rule in Equity.

A little consideration will, however, show that section 788 and the laws of 1795 and 1861, from which it is drawn, have nothing to do with the service of subpœnas in chancery.

Rule 7 of the Rules in Equity says:

"The process of subpœna shall constitute the proper mean process in all suits in equity."

As the act of 1842 adopts the English Chancery Practice, except where it may be modified by the rules of this court, rule 7 might indeed have been omitted; the subpœna must have remained the "mean process" until done away with by express words.

It is, in form, a writ addressed by the sovereign, or the chief executive, not to a sheriff or other officer, but to the defendants named in a bill of complaint, thus:

"The President of the United States to Mary McKinley, John S. Martin, Jesse S. Gray, greeting. We command you, and each of you, that you answer a bill of complaint exhibited against you by Stephen E. Jones in our District Court, etc., and this you shall in no wise omit, under the penalty of, etc. Teste, etc." It retains this form under the rules in equity. Hoffman, in his Chancery Practice, Vol. I., page 113 (as quoted in Holcombe's edition of Barton's Suit in Equity), says of this writ: "No ministerial officer is employed to execute it, but it may be served by a party or a stranger." The old way of beginning an ejectment suit by serving a copy of the declaration on some tenant in possession is somewhat analogous; here also any private person might make the service, there being no precept addressed to an officer.

Such was the practice which the rules in equity found in vogue in the Federal Courts, as it was also the practice then in many of the States.

As the service of a subpœna was the fit act of a private person, nay of the complainant himself, it could not be said to be the execution of "the laws of the United States." The only man who is called upon to execute the behest of the sovereign conveyed in a subpœna is the defendant himself, he

executes the law by answering the bill. The service of a subpœna could therefore never have been in the contemplation of Congress when it clothed the marshal, in 1795, with new powers, like those of the State sheriffs, to execute the national laws. Hence, when the rules of equity, in 1844, for the first time, made the service of subpœnas an official act, to be performed by the marshal, deputy marshal, or nominee of the court, *and not otherwise;* this court had the right to tell the officer, in the words of Rule 13, that he must himself perform the act to which he undertakes to bear witness, any thing in the act of 1795 seemingly to the contrary notwithstanding.

The whole course of proceedure, under the act of August 6, 1842, was so remodeled "as to insure justice and to avoid needless cost and delay." The old process of contempt, with its many stages, which had to precede a decree *pro confesso*, was the cause of much cost and long delays; but to render such a decree, in the first instance, without the fullest assurance that the defendant had been notified would have been the height of injustice; hence the thirteenth and fifteenth rules were the necessary concomitants of the eighteenth and nineteenth; hence, also, the imperative words "and not otherwise."

Look at the gross incongruity of a system of laws which undertakes to base a final judgment on a return like that which is before us. The rules of evidence shut out all hearsay on the smallest point that may arise at the trial of a cause. But it is here proposed to render judgment on the whole cause on the barest hearsay, namely—Hays, the bailiff, tells Crittenden, the marshal: "I have served this subpœna;" and therenpon Crittenden, the marshal, shoves this return into the clerk's office. "I have served this subpœna," means "the defendant confesses the whole complaint." But we have for this all important fact only the unsworn statement of J. C. Hays, a man wholly unknown to the Federal law. This return would, under the old practice, not have been sufficient even to justify an attachment for contempt. The

Kentucky law, which recognizes bailiffs specially deputed to serve a single writ, and which governs common law actions in the United States Court in Kentucky, guards the rights and interests of the defendant; for not only must the bailiff return his summons under oath, but he lays himself liable to a prosecution for perjury by making a false return. And it wil be found, on looking through the practice acts of other States, that all or nearly all of them agree with Kentucky in this respect. But who is J. C. Hays? How is he responsible, civilly or criminally, if his return be untrue? And in what way is Crittenden responsible for him?

The distinction between a process, which calls for the exercise of force, and the service of a notice, the returns on which requires nothing but truthfulness, is fully recognized by Judge Choate, in his decision *in re* E. W. Gorgas, already quoted. In answer to the objection raised against the jurisdiction of the admiralty court that "4. The process was not "served by the marshal or deputy marshal, but by one Tobey, "and that therefore there was no seizure of the vessel, etc.," he says, in referring to the alternative given in the first admiralty rule, of a person appointed by the court:

"Undoubtedly, in such a case, the person so appointed "would, by the rule, be required to do all that the marshal "would otherwise be required to do under the process, not "only to arrest the ship, but to keep it in custody, give the "notice required by the maritime, and make a return to the "court of the process in his own name."

Here is a distinct admission that a "third person" can neither serve nor return the monition, as far as this is a notice.

In another passage of his opinion, page 468, Judge Choate says:

"The rule of the Supreme Court quoted above (the first "rule in admiralty) does not, in my judgment, have any ref- "erence whatever to the regulation of what a marshal must "do personally, or what he may do through an agent or "special deputy."

Neither does the 15th rule in equity. But the 13th rule does. It says distinctly that the delivery of the process must be made by the officer serving the same.

Again, Judge Choate says that the common law principle by which, in Hunt *v.* Burrel, 5 Johns., 137, "a deputy "sheriff can appoint a bailiff, *in the absence of restrictive rules* "*or statutes*, must apply to the marshal or deputy marshal of "the United States." And he is perfectly right. But we are in the *presence* of a restrictive statute in Kentucky; which, indeed, allows the bailiff to serve the summons, but requires him to make the return under oath.

Two cases from the Colorado District Court, reported in 12th Federal Reporter (both against one Chaves), are cited against us. Both of them are ill reported; that is, the facts do not fully appear. But as far as I can make them out, the process *in a common law suit* had been returned as served by some one who subscribed himself as "deputy marshal," not as a special bailiff, and the attempt was made by the defendant to show from the outside that such person was not a deputy, not being sworn. He was, of course, met by the ordinary maxim about the validity of the acts of *de facto* officers. Certainly the Colorado District Judge would not undertake to revoke the 15th rule in equity, made by the Supreme Court, by holding that any special bailiff is a deputy marshal, and that thus the necessity for the appointment by the court can never arise.

A decision of Judge Ballard's is also cited: United States, *ex rel, vs.* the Jailer of Fayette County. That was the attempt, on *habeas corpus*, to release a prisoner, taken under a warrant from a United States Commissioner, because the warrant was executed by a special bailiff. This is one of the acts which, in the very nature of things, a marshal must often perform through a third person, and falls clearly within the distinction drawn by Judge Choate in the Gorgas case. No judgment is to be based on the unsworn statement of this special bailiff. The defendant ought to have been arrested, and he was; this is best proved by his being in jail.

That the provision of the fifteenth rule, by which the judge may appoint a fit person to serve a *subpœna*, is not a dead letter, I know best from an answer which the Hon. Wm. J. Wallace, of the New York Circuit, was kind enough to make to an inquiry which I addressed to him on the subject:

"DEAR SIR: I do not recall any decision of mine bearing "on the question you suggest. I have appointed persons "specially in certain cases to serve process in chancery "causes, but the rule expressly authorizes that to be done.

"[Signed] WM. J. WALLACE.

"SYRACUSE, Aug. 18, 1891."

If the course adopted in this case was lawful, the judge should and would never have been troubled about such appointments.

## THE RESULT.

We have established the following propositions:

1. That a subpœna can be served only by a marshal, deputy marshal, or appointee of the court. Rule 15.

2. That a man deputed to serve one process is not a deputy marshal within the meaning of Rule 15, of "*In re* Gorgas," 10 Benedict, and of Sec. 27 of the Judiciary Act.

3. That whatever work in the service of process an officer may perform through an unofficial person, he must deliver a subpœna in chancery in person. See Rule 13, and see opinion "*In re* Gorgas" as to "giving notice."

4. That the service made by the bailiff can gain no force from the State Law, being unsworn. (Ky. Code of Practice, Sec. 47) Lloyd *v.* McCawley, 14 B. M., 553.

It follows that the service of process in this case is defective; that the subpœna has not been served on John S. Martin, and that the pretended decree against him was null and void.

Having established that the return of the process was wholly unauthorized, we have but little to add in order to show our right to treat the decree and decretal sale as void. In fact, in the court below, counsel for the defense took such a consequence for granted. We will, however, shortly state the authorities on this branch of the case.

The foremost among these authorities is Galpin *v.* Page, 18 Wall., 366, where the court lays down the rule that a decree based upon defective service may be collaterally attacked as void, and says further:

"Presumptions are only indulged to supply the absence "of evidence or averments respecting the facts presumed. "They have no place for consideration when the evidence is "disclosed, or the averment is made. When, therefore, the "record states the evidence or makes an averment with ref- "erence to a jurisdictional fact, it will be understood to speak "the truth on that point, and it will not be presumed that "there was other or different evidence respecting the fact, or "that the facts were otherwise than averred. If, for ex- "ample, it appears from the return of the officer, or the "proof of service contained in the record, that the summons "was served at a particular place, and there is no averment "of any other service, it will not be presumed that service "was also made at another and different place; or, if it ap- "pears in like manner that the service was made upon a "person other than the defendant, it will not be presumed, "in the silence of the record, that it was made on the de- "fendant also. Were not this so, *it would never be possible* "*to attack collaterally* the judgment of a Superior Court, "although a want of jurisdiction might be apparent on its "face."

The decision in this case and in Pennoyer *v.* Neff are too well known to require further remark. Applegate *v.* Lexington & Carter Co. Mining Co. (from this court), in 117 U. S., recognizes these principles fully.

Still stronger is the language of the Supreme Court of the United States in Williamson *v.* Berry, 8 Howard, 540:

"But it is an equally well settled rule in jurisprudence "that the jurisdiction of any court exercising authority over "a subject may be inquired into in every other court when "the proceedings in the former are relied upon, and brought "before the latter, by a party claiming the benefit of such "proceedings."

But as lands in Kentucky are affected by the void decree, the law and precedents of Kentucky must be of great weight in determining the case. It is found in Knott *v.* Jarboe, 1 Metc., 507, where a sheriff, acting as administrator of an estate, had served the summons in his action against debtors to the estate himself, instead of giving it to the coroner, and a judgment by default rendered on such unlawful service was attacked as void. In the suit assailing the judgment, it seemed to be admitted that the copies of summons had been actually delivered, and that the defendant had knowlege of the pendency of the suit. Says the court: "There was, then, no "legal or valid service of process upon the appellant, and it "results, as a legal consequence, that the judgment was, as to "him, a nullity, and he was no more bound or concluded by "it than if a notice of the commencement of the suit had "been served upon him by a private person, having no color "of official authority."

That is, where a private person does actually deliver a copy of the summons so that the defendant has *knowledge* of the pendency of the suit, still the judgment rendered by default is void. "Knowledge" is not "notice."

We have already referred to Lloyd's adm'r *v.* Macauley's adm'r, 14 B. M., 540. Here a sale made under a decree was set aside because a bailiff had not sworn to his return. Sales under decrees were also disregarded as void in Cox *v.* Story, 80 Ky., 64, and Cheatham *v.* Whitman, 86 Ky., 614, because the decree was based upon defective service upon infants; in the former case, a defective service of an order of revivor. In all these cases the land attempted to be sold under the objectionable decrees was recovered back; the title did not pass under the attempted sales.

Under the laws of the United States the return of the subpœna in the case before us was defective, and the decree rendered upon it was void, and both under the law of the United States and under the law of Kentucky a sale under such a decree confers no title.

I therefore ask a reversal of the decree by which the appellant's bill was dismissed.

Respectfully submitted,

LEWIS N. DEMBITZ,
*For Appellant.*

N. B.—Appellee carefully avoids all reference to rule XIII. regulating the *mode* of serving subpœnas. Also avoids all reference to the fact that the Kentucky Code of Practice of 1876, in force in 1879, repeals the General Statutes of 1873.

We answer to point I. that the clear import of the return is that it was made by the bailiff.

This court will not construe the return against its obvious meaning.

L. N. DEMBITZ, *for Appellant.*

## AUTHORITIES RELIED ON.

Rules in Equity, 7, 13, 15, 18, 19.
Rev. Stat. U. S., sections 788, 780–782, 732, 913.
Judiciary Act, sec. 27, Act of August 6, 1842, sec. 6.
Hoffman's Chancery Practice, Vol. I, p. 113.
Kentucky Code of Practice (1876), sec. 47.
Kentucky Gen'l Stat., chap. 100, sec. 7, 8.
*In re* Gorgas, 10 Benedict, 460, 466, 469.
Galpin *v.* Page, 18 Wall., 366.
Williamson *v.* Berry, 8 Howard, 540.
Pennoyer *v.* Neff, 95 U. S., 714.
Lloyd's ad'r *v.* McCauley's ad'r, 14 B. M., 535, 542, 543.
Thompson *v.* Moore, 12 Kentucky Law Reporter, 664.
Knott *v.* Jarboe, 1 Metc., 507.
Cox *v.* Story, 80 Ky., 64.
Cheatham *v.* Whitman, 86 Ky., 614.

The case of Shaefer *v.* Gates and wife, 2 B. Mon. 453, is also relied on.

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# In the Supreme Court of the United States.

JOHN S. MARTIN, - Complainant and Appellant,

*AGAINST*

JESSE S. GRAY, - - - - Appellee.

## BRIEF FOR APPELLEE.

ON APPEAL FROM THE CIRCUIT COURT FOR THE DISTRICT OF KENTUCKY.

B. F. BUCKNER,
JAMES S. PIRTLE,
For Appellee.

COURIER-JOURNAL JOB PRINTING CO.

# In the Supreme Court of the United States.

JOHN S. MARTIN, - - - - Appellant.

VS.

JESSE S. GRAY, - - - - Appellee.

## BRIEF FOR APPELLEE.

The appellant seeks to avoid a sale of land made under a decree of the U. S. Circuit Court, District of Kentucky, in 1879, upon the ground that the service of the subpœna upon him was void. This suit was commenced eleven years after the sale. The plaintiff was, during this time, under no disability. The bill contains but one averment attacking the service of the subpœna. It is singular in its form, in view of the fact that one of the arguments of counsel attacking the return upon the subpœna is that the special deputy, or bailiff, who was appointed to serve the subpœna made no affidavit of his action. This is the averment: "Nor was there any service of the subpœna upon him otherwise than the following return appears upon the subpœna issued in said cause and which is on file with the papers thereof: 'J. C. Hays, S. H. C., is hereby appointed

special bailiff to execute the within subpoena on J. S. Martin and Mary A. Martin, February 13, 1878.

"'R. H. CRITTENDEN, *U. S. Marshal.*

"'Executed the within subpœna on J. S. Martin and Mary A. Martin by delivering a copy to each in person. February 14, 1878. "'R. H. CRITTENDEN, *U. S. Marshal.*

"'J. C. HAYS, *Special Bailiff.*'"

## I.

### The Bill is Defective.

There is no allegation that the service was made by J. C. Hays, special bailiff, and none that if so executed the special bailiff had no legal authority nor that he made no affidavit of his action. There is no allegation that the return upon the subpœna was made by the special bailiff and not by the Marshal of the court.

The return is susceptible of being taken as made by the Marshal, and, as all averments are construed against the pleader, in the absence of allegation that it was not so made the court must take the bill to mean that the subpœna was served by the Marshal. There is no objection made to the form of the return.

If this view of the bill is correct there is no equity in it.

## II.

### The Service is Good, if Made by Hays, Special Bailiff.

A cursory examination of the powers and authority of the Marshal is necessary at this point in the argument.

Section 776, Revised Statutes United States, provides for the appointment of a Marshal in each district. Section 780 authorizes him to appoint any number of deputies he may desire, and

there being nothing in the statute to restrain his power in that respect, they may be appointed with general or special authority. The appointment may be made without any other formality than the taking of a prescribed oath before the District Judge, or before any Judge of the State Court, Justice of the Peace or Notary Public, if the deputy resides more than twenty miles from the place where the District Judge resides, or may be, at the time of appointment. (Sec. 782.) It is not required that the appointment be entered of record, or that the assent of the court should be given thereto, although, by Section 780, the deputy may be removed by the District or Circuit Judge at pleasure. With the exception of these statutory provisions the power of deputing the office of Marshal is practically without limit, and is governed by the common law rules applicable to such offices.

Section 787 gives the Marshal the power to execute *mesne* and final process. It is in these words:

"SECTION 787. It shall be the duty of the Marshal of each district to attend the district and circuit courts when sitting therein, and to execute, throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty."

Section 788 is in these words:

"The Marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the Sheriffs and their deputies in such State may have, by law, in executing the laws thereof."

These two sections apply to entirely different subject matter. The first is a general authority to the Marshal to execute all precepts of the court directed to him and issued under the authority of the United States. This embraces subpœnas, capias, executions, injunctions; in a word, all the process of the Federal Courts, *mesne* and final. It is as comprehensive in

this regard as language could make it, and needs no aid from any other section.

Section 788, on the other hand, has no application to the service of process, but was intended by a comprehensive grant of authority to clothe the Marshal with all other powers which the Sheriff of a county has under State law, such as power (in cases of Federal jurisdiction) to summon a *posse comitatus;* to read the riot act in cases of a riot; to order the military to fire on a mob about to destroy government property; to act on proper occasions as a peace officer; to make arrests in certain specified cases without a warrant; to break an outer door in executing criminal process, etc., etc.

This seems too plain for argument. The execution of a subpœna in chancery is not the execution of a law of the United States. The broadest and most liberal construction can not give it this meaning, and certainly liberality of construction is not needed to clothe the Marshal with the most ample authority to perform all the duties incident to his office relating to the service of process.

Supposing, therefore, for the sake of the argument, that it appears that the service of the subpœna was by Hays as a special deputy appointed by the Marshal with authority only to serve this particular writ—why is not the service good? The only requirement to make the service formal and absolutely regular is that Hays, before serving the subpœna, took the oath required by Section 782. The argument on the other side is based on the assumption that he failed to do what the law required him to do, and that if he so failed, the service was void. This is not only a reversal of the maxim *omnia præsumuntur rite et solemniter esse acta*, but the deduction is unsound if the premise be admitted.

The subpœna was returned by the Marshal and the Court acted on the service. When the return is attacked collaterally every presumption (especially after the lapse of so many years) must

be indulged in its favor. There is no possible way in which the oath of office, whether taken before the District Judge, or before some of the other officers mentioned in Section 782, could appear in this record. And the Judge who rendered the decree must be presumed to have known and to have performed his duty with reference to the service. That Hays must have taken the oath of office is as much to be presumed in a collateral attack, as that Crittenden, the Marshal, qualified. They were both public officers *de jure or de facto*, and the same presumption exists as to the validity of their official acts.

If there was ever a case for the application of the maxim, *omnia præsumuntur rite esse acta*, this seems to be one. The actual service of the subpœna is not denied, notice of the pendency of the action is not denied. The complainant allows another, for eleven years, to enjoy the rents and profits of the property in dispute, and his only plea when he comes into court is that it does not appear from this record that Hays, the special deputy appointed to serve the subpœna, was sworn.

The value of judicial proceedings is of too great interest to the country at large to allow them to be set aside on so trivial a claim.

But the failure of Hays to take the oath of office, if he did not in fact take it, was immaterial. The mere taking of the oath of office, although the proper and formal mode of induction into office, is not indispensable to the validity of the acts of the officer. In Farmers' Bank vs. Chester, 6 Hump. (Tenn.), 458, the clerk appointed a deputy who acted without taking the oath of office. This deputy took the acknowledgment of a deed, the registration of which was attacked on this ground. The court held the acknowledgment good, although the statute authorized acknowledgments to be taken by deputies "legally appointed." Similar principles are declared in Sharp vs. Thompson, 100 Ill., 447; Coles County vs. Allison, 23 Ill., 437; Douglass vs. Neil, 7 Heisk (Tenn.), 438; Soudant vs.

Wadhams, 46 Conn., 218; Gunn vs. Tacket, 67 Ga., 725; State vs. Perkins, 4 Zab., 409; McBee vs. Hake, 2 Speers (S. C.), 138; Knight vs. Wells, Lutw., 508; Dows vs. Irvington, 13 Abb. N. C. (N. Y.), 162; People vs. Collins, 7 Johns, 554; Horton vs. Parsons, 37 Haw., 42.

Indeed, the failure to observe the formalities required by statute or the common law in the deputation of an office has never been held material. Offices which are deputable may be filled in the most informal way, and the acts of the deputy are good as to third persons. This has been the law from the earliest times. In Lord Dacre's case, 1 Leon., 228, the servant of the stewart of a manor held the manorial court without any authority of record, and his acts were held good as to third persons; and in Leake v. Howell, Cro. Eliz., 533, the deputy of a deputy was held to be a good officer *de facto*; and in Harris v. Jays, Cro. Eliz., 699, a deputy was appointed to hold a manorial court by persons who had no authority to appoint him, and his acts were held valid in admitting copy-holders against all but the crown; and Lord Holt decided, in Parker v. Kett (1 Lord Raymond, 658) that a deputy of a deputy was a good steward *de facto* in a manorial court; and in Rex v. Bedford Level, 6 East, 356, Lord Ellenborough held the act of a deputy after the death of his principal and before the fact of death became notorious, valid. And in Parker vs. Baker, 8 Paige, 428, where the Governor appointed an officer without the authority to do so, the acts of the officer *de facto* were held valid. Cases could be multiplied almost indefinitely, but those cited will suffice. The whole doctrine of this branch of the law is most ably discussed in State v. Carroll, 38 Conn., 449, to which the Court is referred.

We conclude, therefore, (1) that the Marshal had authority to appoint Hays a special deputy; (2) that Hays, having accepted the appointment and made service of the subpœna, he must be presumed to have taken the oath of office, and that he was, therefore, a deputy *de jure*; (3) but if the *onus* is thrown on the

defendant to show that he qualified, then that the qualification was immaterial because he was a good deputy *de facto*, and his act binding on the public.

## III.

### The Return is Sufficient.

Nor is there, as we believe, any equity in the bill if the return upon the subpœna be taken to have been made by the special bailiff, and the fifteenth rule in equity be construed in connection with Section 788, Revised Statutes of the United States, which gives the Marshal in each State the same powers in executing the laws of the United States as the Sheriffs have by law in executing the laws of the State.

By the statute in Kentucky in force when Section 788, United States Revised Statutes, became a law, a Sheriff might by writing empower any person to execute an original or mesne process. The person so appointed was required to indorse his action on the instrument empowering him. The indorsement thus made was given the same validity and effect in law as if made by the Sheriff himself.

In this case the U. S. Marshal, by writing on the subpœna, empowered J. C. Hays, S. H. C., to execute the subpœna. If the return is to be taken as having been made by J. C. Hays, S. H. C., then he indorsed his action on the instrument empowering him. This would seem to be entirely regular. But the counsel for appellant claims that as no affidavit is attached to the subpœna the indorsement is of no effect. Waiving the defective pleading upon this point, we maintain that the absence of the affidavit is immaterial. The provisions of the General Statutes of Kentucky above referred to are as follows:

General Statutes, Chapter 100, Section 7: "A Sheriff may by writing empower any person to execute an original or mesne process. The person so appointed shall indorse his action on

the instrument empowering him, and shall make affidavit to the truth of the indorsement and attach the same to the process and deliver the indorsement and affidavit to the Sheriff or his deputy, to be returned to the proper office. The indorsement made as above directed shall have the same validity and effect in law as if made by the Sheriff.".

An analysis of these provisions of the Kentucky Statutes shows that the person empowered by the Sheriff to serve the process after performing that duty is required to do four things. The statute says that

1. He shall indorse his action on the instrument empowering him.

2. He shall make affidavit to the truth of indorsement.

3. He shall attach the affidavit to the process.

4. He shall deliver the indorsement and the affidavit to the Sheriff or his deputy, to be returned to the proper office.

What is it that gives effect to the return of the special bailiff? The statute answers the question: "The indorsement made as above directed shall have the same validity and effect in law as if made by the Sheriff." The statute does not say that "the indorsement with the affidavit" shall have the same validity and effect as an indorsement by the Sheriff. The indorsement alone has that effect. To strengthen this view we find that the Kentucky statute also provides that "The Sheriff shall be responsible for the acts of the party so appointed" by him to serve process. To escape the conclusion so apparent the counsel for appellant refers to a decision of the Court of Appeals of Kentucky in 14 Ben. Monroe, 535. Lloyd vs. Macauley. The Court in that case construed the provisions of the Kentucky Code of Practice, and as in matters of practice the decisions of State courts upon code practice can be no precedents in equity cases, it is not perceived how the case cited has any bearing in this controversy.

## IV.

### Has the U. S. Marshal the Right to Appoint a Special Deputy?

If the construction of Rule XV. contended for by counsel for appellant be correct, a subpœna can only be served by the Marshal, by a Deputy Marshal regularly appointed, sworn and approved, or by a person appointed by the court. The contention is that the Marshal can not delegate his authority to serve process to a special deputy appointed for that purpose. It is admitted that by the old chancery practice that no strictness was required in bringing to the defendant notice of the filing of the bill against him, yet, without any reason for greater technical construction, it is maintained that the Equity Rule is to be taken literally, while in common law cases and admiralty proceedings the Marshal may, without express authority, delegate his authority to a special deputy. It seems to us that a liberal construction of the Equity Rule would be more in accordance with reason. Much stress is laid upon that part of Rule XV. which provides for the appointment, by the court, of some person, other than the Marshal or his deputy, to serve the subpœna. The rule follows Section 922, U. S. Revised Statutes, which is in these words: "When the Marshal or his deputy is a party in any cause, the writ and precepts therein shall be directed to such disinterested persons as the court, or any justice or judge thereof may appoint, and the person so appointed may execute and return them."

#### Meaning of words "not otherwise" in Rule XV.

The first admiralty rule is nearly in the language of the statute. The effort of counsel to give to the words "and not otherwise" an effect to limit the persons who may serve the process of subpœna to the Marshal, his deputy with full powers, or a person appointed by the Court, is well answered by the opinion of the District Judge found in the transcript. He says:

"Much stress is put upon the words 'and not otherwise' in the fifteenth rule, but these words can not be construed as limiting the powers of the Marshal as to the appointment of his deputies, but rather that persons not having any authority as Marshal or from him, should not execute the subpœna except he be appointed by the court for that purpose. It was then the habit in some of the States to have the subpœna out of chancery to be executed by any person without any appointment or authorization. This was the fact in Maryland, and New Jersey (1 Bland, 29, 132; 1 Green Chy, 309), and in Kentucky such service was good if proven by proper affidavit. (2 Bibb, 93.)"

The question presented by this record has not been before the Supreme Court, but the Circuit and District Courts have, so far as we can find, never had any difference of opinion as to the power of the Marshal to appoint a special deputy to serve process. The practice to make such appointments seems to have prevailed in several of the circuits, and the right so to do has been adjudicated a number of times in reported cases. We have not found that it has been expressly held that a subpœna in an equity case can be served by a special bailiff or deputy, but a special deputy to make an arrest has been held to be an officer, and a special deputy to seize a ship has been held to have all the powers of a Marshal in the matter. The argument that supports these delegations of power by the Marshal also sustains the appointment of a special deputy to serve the subpœna in equity.

By the common law there was no limit upon the power of sheriffs, who are but Marshals of the common law courts, to appoint deputies, and without express authority the Marshals of the United States Courts would have from the nature of their office the duty of serving the writs and other precepts of the courts. By the judiciary act of 1789 such was made the duty of the Marshal, 9 Peters, 603. Unless there were limitation by statute upon his right, the Marshal would have the

same right to appoint special deputies that a Sheriff has, because the same reasons exist for his having such power as exist for the Sheriff having it. The duties each has to perform require the aid of many men, and when a man has been designated by either for a special duty he is to that extent a deputy. The deputies who have all the powers of the Marshal are required by law to be sworn by the court, or some other officer in certain cases; but special deputies whose powers are limited to the special duty are not. The deputy not sworn may perform duties of the office. We ask to submit to the court references to decisions of Circuit and District Courts which show the practice and the reasons for its support.

Wintermute vs. Smith, 1 Bond, 210. Subpœna served by Dolph, claiming to be Deputy Marshal.

JUDGE BOND.—"It is alleged that he is not a deputy. It is proved that he was regularly appointed by the late Marshal and duly sworn as a deputy, but no return was made by the Marshal to the District Judge of the appointment of Dolph as a deputy. This omission would not affect the legality of the service."

United States vs. Jailer of Fayette County, 2 Abb. U. S. Reports, 272. One of the questions was whether or not the Marshal had authority to appoint a bailiff.

JUDGE BALLARD.—"The authority to appoint a special bailiff to execute a particular process is recognized by all the authorities as appertaining to the Sheriff, Watson Sheriffs, 35; Tomlin Law Dic., title bailiff; Hunt vs. Burrell, 5 Johns, 137; Sergeant Court of Appeals vs. George, 5 Litt., 190.

"There are several acts of Congress which expressly recognize this authority as belonging to the Marshal.

"It has been exercised by the Marshal of this district without question, as far as I know, since the establishment of the court, and such, I understand, is the common practice throughout the United States, Conklin's Treatise, 338. But what is

entirely conclusive of the question is that Section 7 of the act of Congress of July 29, 1861, provides that the Marshals of the several districts of the United States shall have the same powers in executing original and mesne process that Sheriffs may have, etc., and the laws of this State (Kentucky) expressly provide that a 'Sheriff may, by writing, empower any person to execute an original or mesne process, 2 Rev. Stat. 340.'"

*In re* Crittenden, 2 Flippin, 212. JUDGE BALLARD.—"When the bailiff is appointed and engaged in the performance of the act authorized he is the deputy of the Marshal, not the general deputy, it is true, but the special deputy. He is deputized by the Marshal to do a particular thing and is, therefore, in fact, as well as in law, a deputy.

The Tug E. W. Gorgas, 10 Benedict, 460:

Objection was made to jurisdiction of court because the process was not served by the Marshal or a Deputy Marshal, but by one Tobey, who it was claimed had no authority to serve it, and that therefore there was no seizure of the vessel so as to give the court jurisdiction.

JUDGE CHOATE.—"The objection to the jurisdiction chiefly urged is that the Marshal can not depute a person who is not a deputy to serve a process directed to him to serve. That the rule of the Supreme Court now in question has not been understood, or construed, as restricting the Marshal, or Deputy Marshal, to a personal performance of this particular duty of arresting a vessel, or other act in pursuance of process for the seizure of property, is sufficiently shown by the uniform practice of deputing to particular persons, not regular deputies, the execution of such process as well since the promulgation of this rule in 1844, as before that time. This rule is to have the same construction with the statutes whose meaning it was designed to express and embody in the form of a rule, and the words in which the rule is framed do not express nor indicate any intention to prescribe a new or more limited mode of perform-

ing the official duties referred to, or any different manner of executing process from that recognized by the familiar decisions of the courts as a proper and lawful mode of service by such an executive officer. The rule of the Supreme Court does not, in my judgment, have any reference whatever to the regulation of what a Marshal must do personally, or what he may do through an agent or special deputy, and, so far as the part of the rule making it imperative on the Marshal or his deputy to serve all process issuing out of the courts of the United States is concerned, it follows what is the clear implication of the Statutes of the United States then existing, and before the rule was made, the Supreme Court declared this to be the duty of the Marshal. (Ins. Co. vs. Adams, 9 Peters, 603.)

That part providing for the special appointment by the court of a person to serve the process in case the Marshal or his deputy is a party to the case, is also taken directly from an existing statute. (Stat. 1789, Ch. 20, Sec. 28.)"

Hyman vs. Chales, 12 Federal Reporter, 855.
U. S. Circuit Court, District Colorado.

HALLETT, D. J.—Defendants move to quash the Marshal's return to the summons on the ground that the person who served the summons was specially appointed a deputy to serve it, and that it does not appear that such person had taken the oath of office, as required by the statute, in relation to the appointment of deputies.

Section 788, U. S. Revised Statute, is referred to: "It appears that under the laws of the State a Sheriff may appoint a person to perform a special service, such as serving a particular writ, and no reason is perceived for saying that a Marshal, under this section, may not have the same authority. Upon general principles, however, if the Marshal may appoint deputies to perform all services, he may appoint one to perform a particular service, and whether that person has taken an oath of office, as prescribed, is not a question for the person who may be affected by

the duty to be performed. It may be a question which can be raised by the Marshal himself as to whether the deputy is properly in his place, but as to the service which he has to perform he is an officer *de facto*, if no more. It does not lie with the person who may be summoned to dispute his authority for that reason."

See United States vs. Harden, 9 Hughes 463, where Dick, D. J. gives effect to Section 788.

We do not, of course, refer to these decisions as authorities for the guidance of this Court, but they are useful in showing a settled practice in the Circuit and District Courts, applied doubtless in hundreds of cases.

The rule of practice thus established we submit is altogether reasonable. The argument of counsel for appellants refines to such an extent that the XV. Equity Rule would under such construction become an exceedingly narrow one and seriously interfere with the business of the Circuit Courts.

Prior to the adoption of that rule a subpœna in Chancery might be served by any one. The object of its adoption was to require that the service should have an official character. It was accordingly provided that the service should be made by the Marshal or his deputies, or by some other person appointed for that purpose by the Court, and *not otherwise*. The rule, therefore, was intended to limit the persons by whom the service might be made to the Marshal (in person or by deputy) and to a person selected by the Court. It was no part of its purpose to regulate the *mode* of service by the Marshal. It left him, as to the manner of service by himself and his deputies, under the common law of the State so far as the same was unchanged by statute. It was not the intention of the Court in adopting the rule to hamper or restrict him in the appointment or selection of subordinates to perform his duties. No Marshal can perform all his duties in person, and it is essential to the prompt and orderly administration of justice that his selection of subordi-

nates should be left free and unrestrained. The words "*not otherwise*" in the rule have no restrictive effect on the Marshal and do not have any application whatever to the manner in which he may make the service.

The rule, therefore, leaves the question of the validity of the act of the Marshal by a deputy to be determined, not by it, but by the general law. If the question was whether an individual, deriving no authority whatever from the Marshal, could serve a subpœna in chancery, then the restrictive words of the rule would control, but upon the question whether there has or has not been a valid deputation of the office by the Marshal, they have no relevancy whatever.

B. F. BUCKNER,
JAMES S. PIRTLE,
*Counsel for Appellee.*